NOTES

The Taft-Hartley Act—An Administrative Chimera

The Taft-Hartley Act,[1] in effecting certain changes in the structure and functioning of the National Labor Relations Board (primarily in its provisions for the separation of functions and its requirements as to evidence and judicial review), reflects characteristic and inveterate criticisms of the administrative process as a whole.[2] The apparition of the Cerberus-like monster of "judge, jury and prosecutor" in a single body, freed from the technical bonds of court rules of evidence and largely autonomous in its fact findings, has long provided the anti-administrative propagandist with his chief weapon. The unvarying pattern of attack, however, and the lack of analysis to support its claims,[3] have sometimes led to the inference that such criticisms serve only as a camouflage for a more basic dissatisfaction with the economic and social policies which particular agencies administer, and for a desire to change them.[4] Thus while the substantive provisions of the Wagner Act [5] were being assailed by employer interests which they regulated as "promoting unionizing" instead of industrial peace, as "forcing" workers into "preferred unions" and "annihilating" independent unions, there were corresponding fulminations directed against the NLRB as a "kangaroo court" which used inquisitorial procedures.[6]

That such claims had little foundation was made apparent not only in the many decisions of the Supreme Court which found that the Board's procedures satisfied the fundamental conceptions of due process and fair hearing, with special stress on their guarantees against administrative arbitrariness;[7] but also in the careful study made by the Attorney General's Committee on Administrative Procedure with its monograph devoted to

1. Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947). Officially cited as the "Labor Management Relations Act, 1947."

2. In general, see GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941); Jaffe, *Invective and Investigation in Administrative Law,* 52 HARV. L. REV. 1201 (1939). For a recent erudite but distorted attack on the administrative process, which pays some particular attention to the NLRB, see Butler, *The Rising Tide of Expertise,* 15 FORD. L. REV. 19 (1946).

3. For a superficial statement of the usual criticisms, which evinces such a lack of analysis, see METZ AND JACOBSTEIN, A NATIONAL LABOR POLICY, c. 11 (1947).

4. See Gellhorn and Linfield, *Politics and Labor Relations: An Appraisal of Criticisms of NLRB Procedure,* 39 COL. L. REV. 339 (1939). The Logan-Walter Bill for the regulation of administrative procedures apparently arbitrarily included some agencies and excluded others from its coverage. The NLRB was included. This gave rise to the suspicion that the Bill was aimed at a regulation of policies rather than of agencies. Nathanson, *Some Comments on the Administrative Procedure Act,* 41 ILL. L. REV. 368, at 371, n. 14 (1946)

5. 49 STAT. 449 (1935). Officially cited as the "National Labor Relations Act."

6. For an excellent example of both types of propaganda see ISERMAN, INDUSTRIAL PEACE AND THE WAGNER ACT (1947). One of the most recent characterizations of the NLRB as a "Kangaroo Court" appears in Cahill, *Do We Need Labor Courts?,* 31 MARQ. L. REV. 1 (1947). The last major attempt to amend the Wagner Act's administrative machinery along the lines suggested by the traditional criticisms was in the Smith Bill of 1940, H. R. 8813. For a review of its various proposals see 5 LAB. REL. REF. MAN. 1099-1126 (1940). For a recent expression of judicial concern over the constitutionality of the administrative structure of the old NLRB, see the reluctantly concurring opinion of Waller, J., in NLRB v. Robbins Tire and Rubber Co., 161 F. 2d 798, at 801 (C. C. A. 5th 1947).

7. The archetype of these decisions is NLRB v. Jones and Laughlin Steel Corp., 301 U. S. 1 (1937), which upheld the constitutionality of the National Labor Relations Act.

the NLRB, a study which failed to discover any need for major changes in the Board's existing practices.[8]

One of the significant factors in the evolution of administrative bodies has been the need to free them not only from the technicalities of court-room procedures, but also from the preconceived notions of how to dispose of controversies, which would have proved unsuited to the new and broad policy-making functions involved in the expanding area of administrative regulation. The Taft-Hartley Act, in its amendment of the Wagner Act, undertakes fundamental changes in policy.[9] It was natural for its proponents, therefore, to seek some more sympathetic machinery to effectuate their ends than they could have expected from a continuation of the existing administrative methods.

The Administrative Procedure Act of 1946[10] might have served as a guide for the fashioning of this new machinery, but the interpretations which it had received, varying from the moderate estimate that it did no more than codify the best existing practice to the drastic view that it introduced revolutionary changes, were too equivocal to supply the desired mutations from the old procedures.[11] As applied to the Wagner Act, the prevailing opinion (though not the consensus) seems to be that the Administrative Procedure Act required primarily only two major revisions in practice—the satisfaction of its publication provision, and the enhancing of the status of the Trial Examiner in the Board's decisional hierarchy.[12]

Thus it appears that the Taft-Hartley Act, in rejecting the proposed administrative norm, has effected a partial regression to the judicial process from which the National Labor Relations Board had been successfully emancipated. The ideal sought has been, at least in adversary proceedings, to constitute the Board as nearly as possible in the nature of an appellate court. Whether this is wise and justifiable may appear in the following survey and analysis of particular aspects of the changes. At all events the Board has become an anomaly among the majority of comparable bodies in the administrative system.[13]

I. The Separation of Functions

The Wagner Act: The Wagner Act established the National Labor Relations Board as a monolithic structure in which the Board of three

8. The Final Report of the Attorney General's Committee on Administrative Procedure in 1941, will henceforth be cited as Final Report of AGCAP. In its monograph series, Monograph No. 18, Sen. Doc. No. 10, 77th Cong., 1st Sess., Part 5 (1941), is concerned with the NLRB. This will be cited as Monograph No. 18.

9. These changes deal primarily with the regulation of certain practices of labor organizations. Labor Management Relations Act, 1947, Title I, Section 1. For discussions of particular aspects of the substantive changes of the Act, see Notes, 96 U. of Pa. L. Rev. 85 (1947), and 96 U. of Pa. L. Rev. 101 (1947).

10. Pub. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946).

11. The more moderate view of the Administrative Procedure Act appears in Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill. L. Rev. 368 (1946). The "revolutionary" view is taken by Blachly and Oatman, *The Federal Administrative Procedure Act*, 34 Geo. L. J. 407 (1946), and by Cohen, *Legislative Injustice and the Supremacy "of Law,"* 26 Neb. L. Rev. 323 (1947). See also Comment, *The Federal Administrative Procedure Act—Codification or Reform?*, 56 Yale L. J. 670 (1947), with particular reference to the NLRB at p. 695.

12. Findling, *NLRB Procedure: Effects of the Administrative Procedure Act*, 33 A. B. A. J. 14-17, 82 (1947); Reilly, *The Labor Board and the Administrative Procedure Act* in The Federal Administrative Procedure Act and the Administrative Agencies (Warren ed. 1947).

13. 5 Pike and Fischer Ad. Law (News Letter) 323, 333, Releases Nos. 148 and 152 (1947).

members had the final responsibility and authority for every phase of operation, in both complaint and representation cases.[14] Those who readily personify legal concepts and institutions to suit their conclusions had no difficulty in endowing the NLRB with its dual personality of prosecution and adjudication and anathematizing the result with the maxim that no man should be a judge in his own cause. A more realistic approach and a more discriminating analysis, however, revealed this "personality" as a highly organized and complex structure capable of an internal separation of functions at various levels of its operation, whereby the dangers of combining prosecution and adjudication at any particular level were minimized.[15] The Attorney General's Committee on Administrative Procedure in 1941 concluded that such separation had been satisfactorily accomplished, at least at the hearing level, by effecting virtually a complete separation between trial examiner and trial attorney both prior to and after the hearing, through the organization and internal procedure of the Board.[16] Recognizing the insulation of the trial examiner in complaint cases as a primary guarantee of judicial impartiality, the Committee recommended that the calibre of the trial examiners should be improved and that their initial decision should be the final decision of the Board, unless called up for review by the agency heads. Contrasted with this was the recommendation of the Benjamin Committee concerning the New York State Labor Relations Board that the functions of prosecution and ultimate decision be entrusted to two entirely independent agencies.[17]

The Administrative Procedure Act: Section 5 (c) of the Administrative Procedure Act of 1946 appears to require an *internal* separation of functions with reference to the adjudication of complaint cases in federal administrative tribunals. This section of the Act places the responsibility for making the initial *or* recommended decision in the officers who preside at the reception of evidence pursuant to § 7, and frees such officers from the supervision or direction of anyone engaged in the performance of investigative or prosecutorial functions. In addition it disqualifies the investigating and prosecuting branch from participating in the deciding process of cases in which they are or have been engaged, or in factually related cases. The NLRB made those internal readjustments which it considered to be required for full compliance with § 5 (c). In the central organization of the Board, the Trial Examiners' Division under the supervision of the Chief Trial Examiner was designated as the final authority in the conduct of hearings on complaints, with the power to appeal for advice "with respect to problems of interpretation of law or policy in

14. This included the decision to issue complaints of unfair labor practices, to initiate representation proceedings, to hold hearings, to certify bargaining representatives, to issue remedial orders and institute proceedings for their enforcement in the courts and contempt proceedings if the enforcing orders were disobeyed.

15. See Davey, *Separation of Functions and the National Labor Relations Board,* 7 U. OF CHI. L. REV. 328 (1940).

16. Monograph No. 18, p. 35 *et seq.* An excellent treatment of the preferability of the "internal" separation of functions over a complete independence for the prosecuting official is given in the Final Report of AGCAP at pp. 55-60. For the Committee's recommendations as to the status and functions of the proposed Hearing Officers see the Report at pp. 46-52. Compare the proposals for administrative reform of the Labor Board in the National Labor Code in TELLER, A LABOR POLICY FOR AMERICA 53 *et seq.* (1945).

17. Benjamin Report on Administrative Adjudication in the State of New York (1942). Volume 5 of this report contains a Supplementary Report on the State Labor Relations Board. For an evaluation of some of its findings see Jaffe, *Administrative Procedure Re-examined: The Benjamin Report,* 56 HARV. L. REV. 704 (1943).

connection with particular cases" to an Appeals and Review Committee in Washington. This Committee, on giving advice, was disqualified from further participation or advising in any stage of the decision of the same or a factually related case. Final review of a Regional Director's refusal to issue a complaint was lodged in the Board itself.

Analysis of pre-Taft-Hartley Act Structure: Before proceeding to a discussion of the changes created by the Taft-Hartley Act, it may be well to evaluate some criticisms of the structure described above as it evolved both in practice and in response to the specific requirements of the Administrative Procedure Act, and also to point out some of its advantages. The Board itself in Washington would on some occasions have charges of unfair labor practices referred to it for decision as to the issuance of a complaint. Such cases generally involved novel and significant fact situations, where it was essential for the ultimate policy-making body to decide whether to take jurisdiction or not. This practice led to the accusation that if a complaint were issued in such a case, the subsequent decision of the Board would contain a large element of prejudgment of the issues, with what was described as a resulting "psychological incapacitation." [18] This criticism was largely nullified by the operation of the Appeals and Review Committee previously described. Moreover, analogies in the judicial process have been pointed out, as for example a court's decision to issue a preliminary injunction or to grant certiorari.[19] This function of the Board itself declined in importance when it no longer became necessary to select trial cases carefully to test the Board's authority in the courts. The disqualification of the Board on the ground of prejudice became an insistent argument for separation of functions by an absolute schism, possibly because the decision to issue complaints in significant cases necessarily was a great factor in developing the process of collective bargaining which the Wagner Act adopted as the means to industrial peace; and interests adverse to the bargaining process naturally viewed its stimulation as an indication of partiality.

Informal Level: In viewing the NLRB in its prosecutorial role, it must always be borne in mind that only a small percentage of unfair labor practice charges ever proceeded to the formal stage of complaint and hearing. During the fiscal year 1946, for example, of the total number of unfair labor practice cases closed, 90.7% were closed before formal action either by adjustment, withdrawal, dismissal or otherwise.[20] Such negotiations and informal settlements have been described as "the lifeblood of the administrative process," [21] and indicate that "prosecution" embraces a wide range of functions and powers. Whether informal disposition of charges would fare any better with an administrative official devoted exclusively to prosecution will be considered later.

Formal Level: More serious strictures over the fusion of functions in one agency arose at the level of formal hearing. The trial examiner was under a duty "to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting com-

18. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 34 (1941). Davey, *supra,* note 15 at 331.

19. See Statement of NLRB Chairman Herzog in *Hearings before Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22,* 80th Cong., 1st Sess. 1925 (1947). To the same effect see Final Report of AGCAP at p. 57.

20. 11 NLRB ANN. REP. 79 (1947).

21. Final Report of AGCAP at pp. 58, 59.

merce . . ." [22] This was understood to accord him a more active role in the development of the record of a case than that usually played by a judge. Several cases arose where the circuit courts reversed Board decisions on a finding of biased or overzealous conduct of the hearing by the trial examiner.[23] In some instances his examination of the employer's witnesses filled a disproportionately large number of pages of the record.[24] Clearly this sort of criticism involves the question of personnel selection and training rather than any defect in the administrative form.[25] The Administrative Procedure Act, in establishing Civil Service control of the appointment of hearing officers [26] went far to obviate those departures from fair standards that are attributable to personalities rather than procedures.

Finally at the formal-decisional level criticisms were aimed at the role played by the Review Section in working over the intermediate report of the trial examiner and preparing the final draft of the Board's decision, and the "institutionalization" of the deciding process.[27] In addition the presumed loyalty of the Board to its subordinates was felt to result in an unwillingness on the part of its members to admit any errors at the lower levels.

The Taft-Hartley Act: Against this background, an examination of the Taft-Hartley Act's structural reorganization of the NLRB shows that its legislators have aimed at a true functional separation within the framework of the NLRB at all levels in complaint cases.[28] The primary medium

22. NLRB, Rules and Regulations, Series 4, § 203.30, 11 FED. REG. 177A-609 (1946).

23. In NLRB v. Henry K. Phelps, Jr., 136 F. 2d 562 (C. C. A. 5th 1943) it was found that hearings in an unfair labor practice case had been conducted before a "biased and partisan examiner who starting out with a fell and partisan purpose to convict, arrived at a predetermined, and, therefore, biased and partial result" and that the trial examiner took on the role of "investigating accuser and espousing prosecutor." The trial examiner in this case was the present General Counsel of the Board. See NLRB v. Washington Dehydrated Food Co., 118 F. 2d 980 (C. C. A. 9th 1941). (Trial Examiner "intimidated witness," injected much "expert" testimony himself, and acted more in the role of a prosecutor than an impartial examiner). In Montgomery Ward and Co. v. NLRB, 103 F. 2d 147, 156 (C. C. A. 8th 1939), the "exaggerated participation" of the Examiner took the form of an unfair restriction of cross-examination by the respondent's and intervener's counsel and a hostile attitude towards their witnesses, and his own "extreme activity in questioning witnesses." This was considered by the court to be particularly reprehensible inasmuch as Counsel for the Board was himself proficient in its behalf. Instances of this nature, however, have been infrequent. Contrast the attitude of the Board in representation cases. Standard Oil Co. of Calif., 63 NLRB 471 (1945); American Nat. Bank and Trust Co. of Chicago, 71 NLRB 77 (1946).

24. In the *Washington Dehydrated Food Co.* case, *supra* note 23, the "chair-examinations" covered 74 pages of the record. *But cf.* Cupples Co. Mfrs. v. NLRB, 106 F. 2d 100 (C. C. A. 8th 1939), where, although cross-examination of the companies' witnesses by the Trial Examiner covered 155 pages of the record, since there was nothing to indicate unfairness in his attitude, the Board decision was not reversed on that score.

25. See Monograph No. 18 at p. 40. See Donnelly Garment Co. v. NLRB, 67 Sup. Ct. 756 (1947), *reversing* 151 F. 2d 854 (C. C. A. 8th 1945).

26. Section 11 of the Administrative Procedure Act provides for appointment by and for each agency of qualified and competent examiners, "subject to the civil service and other laws." Examiners so appointed are removable by their agency "only for good cause established and determined by the Civil Service Commission."

27. The Attorney General's Committee recommended the elimination of the Review Staff. Final Report of AGCAP at p. 52.

28. The labor bill as reported by the House Committee required the establishment of a separate "Administrator" in charge of the investigation and prosecution functions of the old Board. The Administrator was to head an independent agency and to act "free of influence and control by the Board and its staff." H. R. REP. No. 245, 80th Cong., 1st Sess. 26 (1947). The Senate Committee made no provision for a separation of functions.

of this separation is the new General Counsel. Section 3 (d) of the Act establishes the office of General Counsel of the Board, and in addition to "the exercise of general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices," vests in him the "final authority . . . in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board, . . ." Pursuant to this provision, the NLRB's new general statement of procedure, in reference to complaint cases, declares that: "In certain types of cases, involving novel and complex issues, the Regional Director, at the discretion of the General Counsel, must submit the case for advice from the General Counsel before issuing complaint." [29] Thus here is one respect in which the General Counsel succeeds to what was originally an important policy-making function of the Board itself, and one which will again carry much weight in the initial explorations of the many new provisions of the Act. The current Rules and Regulations provide for review by the General Counsel of a decision by the Regional Director declining to issue a complaint.[30] Under the Wagner Act this was again a prerogative of the Board itself.[31] In representation cases on the other hand, because of the presumed non-adversary nature of the proceedings, the separation of functions is not considered to be of any significance. On refusal of the Regional Director to issue a Notice of Hearing after a petition for certification or decertification has been filed, the petitioner may obtain review of this dismissal directly with the Board in Washington.[32] This split may have dangerous potentialities. The policies prescribed by the General Counsel for the Regional Offices with regard to the issuance of complaints may establish a certain minimum of evidentiary requirements before such a complaint may issue. Thus, for example, as will appear in the discussion of the new provisions relating to evidence in the Act, a subtly dominated or supported company union may well escape without any hearing on charges filed by a rival, non-dominated union. Yet, if the rival union petitions for certification and the Board as the final authority decides that a representation hearing should be held, it might well be that the Board would view the unfair labor practice charges in a different light from the General Counsel. In such instances it would seem desirable that the final authority to decide whether a complaint should be issued, and if so, to order the consolidation of the complaint and representation proceedings, should be vested in the representation authority rather than in the prosecuting authority. In this way it could be assured that any election which might be held would be freed of any possibility of the taint of company-dominated votes. In the past the usual procedure was to impound the votes for the company union until a complaint hearing had been held. Although the new Rules and Regulations provide for the impounding of contested ballots and for an investigation of objections thereto by the Regional Director, and also for a hearing before the Board on exceptions to his report which are considered to raise substantial issues, the Board is still not empowered to

29. NLRB, Statements of Procedure, General Statement, § 202.8, 12 FED. REG. 5652 (1947). For the anomalous position of the Regional Director, see text 74 *infra.*

30. NLRB, Rules and Regulations, Series 5, § 203.19, 12 FED. REG. 5659 (1947).

31. NLRB, Rules and Regulations, Series 4, § 203.15, 11 FED. REG. 177A-607 (1946).

32. NLRB, Rules and Regulations, Series 5, § 203.63, 12 FED. REG. 5665 (1947).

order the institution of unfair labor practice proceedings.[33] On the contrary, even where a complaint has been issued, the Rules and Regulations provide that the General Counsel, whenever he "deems it necessary in order to effectuate the purposes of the Act, or to avoid unnecessary costs or delay . . ." may *permit* the filing of a representation petition with him. He, and not the Board, has the authority to order the consolidation of any proceedings. The result may be divergences in policies which will work a hardship on a union petitioning the Board for certification against such a background.

The chief objections to the newly created functional duality are the likelihood that amicable dispositions at the informal level are less likely, where the prosecuting officials cannot turn to the deciding branch to discover the policies applicable in a given situation, and the possibility that a prosecuting agency is more likely to be preoccupied with making a successful record of prosecutions, pressing every close issue in an attempt to prognosticate what the Board will decide.[34] It has been pointed out, however, that in the administration of the Internal Revenue Code, there has been an equally high if not a higher record of informal settlements than by the NLRB, despite the complete functional separation through which it operates.[35] But the Internal Revenue Bureau follows a policy of much more detailed administrative regulation than does the NLRB, so that it is clearer what its stand will be in a given situation. Moreover, controversies over tax assessments are more amenable to compromise, since the taxpayer can usually put a fairly precise financial value on how much a settlement would be worth to him. On the other hand the admission of an unfair labor practice might involve far-reaching changes in the employer's industrial policies, changes to which he would be less willing to submit voluntarily. The analogy is, therefore, at most superficial.

The greatest difficulty in appraising this informal phase of the Board's activities is caused by the obfuscation of the issues created by the current practice of many unions to circumvent the Board where possible. Thus it cannot be immediately established whether the new administrative structure will result in increased formal litigation or not, (after allowing, of course, for the relative increase that will result from the right to file unfair labor practice charges against labor organizations under the new Act). The employer, no less than the labor organization, faces many new dilemmas under the Act in situations in which it would be a decided advantage for him to be able to predict at the informal level what the attitude of the adjudicating body would be[36]—a result which can best be achieved by a dissemination of policies from the top down through the whole structure.

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33. NLRB, Rules and Regulations, Series 5, § 203.61, 12 FED. REG. 5664 (1947). Labor Management Relations Act, 1947, § 3(d).

34. See statement of NLRB Chairman Herzog, *supra* note 19, at 1928 *et seq.* Final Report of AGCAP at pp. 58, 59.

35. Jaffe, *Administrative Procedure Re-examined: The Benjamin Report,* 56 HARV. L. REV. 704, 712 (1943). Final Report of AGCAP at p. 35.

36. See Final Report of AGCAP at p. 58, that: "Of prime importance . . . is the danger of friction and of a breakdown of responsibility as between the two complementary agencies. This is a danger to private interests no less than to public ones. To create a special body whose single function is to prosecute will almost inevitably increase litigation and with it harassment to respondents. At present the added responsibility of deciding exercises a restraining influence which limits the activities of the agency as a whole. If only to save itself time and expense an agency will not prosecute cases which it knows are defective on the facts or on the law—which it knows, in short, it will dismiss after hearing. The situation is likely to be different where the function of prosecuting is separated out."

Other major disadvantages of the new structure are the division of responsibility and policy-making capacity between two parts of a single agency, and the conflicts that may develop over important issues. That the General Counsel intends to take an active role in the field of policy-making can already be seen from his pronouncements concerning the registration requirements of the Act, demanded of labor organizations which desire to avail themselves of its facilities and seek its remedies.[37] If his initial ruling should be considered too broad, the problem of whether the Board by reason of its rule-making authority could order a revision would arise. Another conflict is implicit in the Board's desire to appoint a Solicitor as its expert advisor on matters of law and policy, and the question whether such an official would be under supervision of the Board or of the General Counsel.[38] The fixing of administrative responsibility is of signal importance in achieving the optimum degree of efficiency in administration. Conflicts over policy may lead to disclaimers of responsibility on both sides. In addition to his final authority in prosecutions, the General Counsel's general supervision over all the regional offices gives him far-reaching power and discretion. The practical working of the Act may to a great degree depend on whether a separation of policy-making functions can be successfully achieved in the Regional Offices in the matters of complaint and representation cases discussed previously, and whether the Regional Director can serve successfully as a medium of the policies of both the General Counsel and the Board. The new categories of unfair labor practices will also present many practical problems whose solution might seem to demand even a separation within a separation,[39] and might illustrate the desirability of having a uniformity of approach by the agency as a whole, rather than having its top body relegated to a solely adjudicatory function in such matters. The dangers of arbitrary decision in a single "administrator" within a Board are no less than those inherent in the Board itself.

Trial Examiner: Section 10 (c) of the Taft-Hartley Act provides that where the Trial Examiner presides at the presentation of evidence in a hearing, he "shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed." This provision has been criticized as in some measure being opposed to the doctrine of exhaustion of administrative remedies, since the tendency may be to by-pass the Board in making an appeal, but basically it seems to be not only fair, but also time-saving. The pressure of most recommendations for the improvement or reformation of administrative procedure has been toward giving a more important role to the official who actually hears the case. If adequate provision is made to assure that he is well-trained and qualified for his position and instructed in the policies of the Board, it seems desirable to give as much weight as possible to his conclusion. From the policy-making standpoint, however, it would be preferable to grant the

37. 20 LAB. REL. REP. (Labor-Management) 265 (1947).

38. 20 LAB. REL. REP. (Labor-Management) 289 (1947).

39. Consider, for example, what would happen on the simultaneous filing of unfair labor practice charges against each other by both an employer and his employees. The General Counsel is responsible for prosecution in both cases.

Board authority at its discretion to consider cases for its own decision without the pre-requisite of the filing of exceptions.[40]

The Review Section: The final step in the structural creation of the Board's new "judicial" position in complaint cases is the abolition of the Review Section. Section 4 (a) of the Act prohibits the employment of any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions, and substitutes the legal assistants of the individual members of the Board with authority to review such transcripts and prepare such drafts. The explanation offered for this change is that it is intended to be comparable to the judicial use of law clerks, and to put an end to the homogeneous and "institutionalized" disposition of cases.[41] The change was apparently motivated, however, by suspicions and dissatisfactions over the policy-making position of the established Review Section and also by the desire for an individualized consideration of the issues by each Board member, with the probability that in important cases the new structure might well tip the decisional balance. Whether this fission of one Review Section into five is justified is open to question. It is well known that in many important decisions under the Wagner Act, Board members did not refrain from filing vigorous dissenting opinions, whenever they felt called upon to do so. Moreover, originally a major function of the Review Section was to work over and improve the intermediate reports of unskilled Trial Examiners. With this problem largely solved, it seems unlikely that the Review Attorneys would have done much to vary the reports which were filed. The centralization of the Board's opinion writing process would be both time and money saving, without any sacrifice of basic fairness. Possibly also the anomalous situation may arise wherein because of the power of the five man Board to delegate its functions to any three of its members,[42] after any three to two decision, the subsequent delegation to the two dissenters and only one of the majority in a similar fact-situation would result in non-uniformity and impair the predictability of the Act. This is at least something to be guarded against by the Board.

Summary: The division of the policy-making role, the uncertainty of administrative responsibility, and the possible adverse effect on informal settlements, are serious dangers which are inherent in the absolute separation of functions adopted by the Taft-Hartley Act. If these dangers outweigh the faults found with the old administrative machinery, the expressed intention to limit the Board to the performance of quasi-judicial functions by the structural reorganization described above, has no justification.

40. For instance § 10(c) of the Act, which provides that back-pay orders "may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered . . .," may present issues whose disposition will be fundamental to effectuating the policies of the Act. Trial Examiner A might issue the order only against the union and Trial Examiner B against both union and employer in identical fact situations, with a resulting non-uniformity if no exceptions are filed in either case.

41. The House and Senate Committees were in complete accord as to this change. H. R. REP. No. 245, 80th Cong., 1st Sess. 25 (1947); SEN. REP. No. 105, 80th Cong., 1st Sess. 89 (1947). The Senate Committee stated at this point that it was their belief that Congress had always intended the Board to function like a court—a strange view at that late date.

42. Section 3(b) of the Act provides that: "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." The purpose of this provision was to obtain a more expeditious disposition of cases by distributing the decisional load.

II. Evidence

a) *The Rules of Evidence*

The Wagner Act: Section 10 (b) of the Wagner Act provided that in hearings on unfair labor practices "the rules of evidence prevailing in courts of law or equity shall not be controlling." The foundation of this approach to the rules of evidence in administrative tribunals in general was established in a series of cases involving the Interstate Commerce Commission and became well grounded in other administrative bodies.[43] It has long been recognized that the common law rules of evidence are an outgrowth of the jury system and that their application to an expert administrative tribunal would be an anomaly.[44] The Supreme Court in *Consolidated Edison Co. v. NLRB,*[45] the prototype of most of the interpretations of the evidentiary provisions of the Wagner Act, found, with reference to the Board's freedom from Court rules, that: "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. . . ." However, in its investigation of the NLRB, the Attorney General's committee discovered that the Board had made no major departures from established principles.[46] The most frequent departures were in the field of the hearsay and the "best evidence" rules. Hearsay evidence of any probative value would not be excluded, and this value was tested in the requirements of substantial evidence to support findings of fact, and on a basis of probative force, instead of by technical criteria.[47] Not only does this flexibility aid in expeditious and expert disposition of cases, but in some instances the relaxation of the "rules of evidence" may be necessary to reach a just

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43. See Stephens, Administrative Tribunals and the Rules of Evidence, A Study in Jurisprudence and Administrative Law (1933).

44. "When the tribunal is composed of experienced professional men, habitually inquiring day after day into the same limited class of facts . . . an expert weighing of evidence can generally be counted upon. The cautions represented by the exclusionary jury-rules can and will be applied by such a tribunal in weighing the evidence without actual exclusion of it." 1 Wigmore, Evidence § 4(b) (3d ed. 1940). Compare Gellhorn and Linfield, *supra* note 4, at 362, to the effect that: ". . . many . . . of the rules of evidence find a major justification in the notion that no reliance should be placed upon the perspicacity of a juryman who is by every hypothesis of practice, if not of legal theory, a dimwitted dullard"

45. 305 U. S. 197 (1938).

46. So in Monograph No. 18 at pp. 45-6: "There have been some departures from the technical exclusionary rules such as the hearsay and best evidence rules, but in the main the traditional rules of evidence are the guiding authorities in the process of proof.

"In following a policy of considering evidence inadmissible under the traditional rules, which in 'the daily life of employers and employees appears to have probative force,' the Board has departed from the hearsay rule more frequently than from any of the others."

47. In NLRB v. Remington Rand Co., 94 F. 2d 862, 873 (C. C. A. 2d 1938), *cert. denied,* 304 U. S. 576 (1939), Judge Learned Hand accepted the standard as hearsay on which "responsible persons are accustomed to rely." See NLRB v. Service Wood Heel Co., 124 F. 2d 470 (C. C. A. 1st 1941); NLRB v. Sun Tent-Luebbert Co., 151 F. 2d 483 (C. C. A. 9th 1945); Union Drawn Steel Co. v. NLRB, 109 F. 2d 587 (C. C. A. 3d 1940). Such evidence has been admitted as a part of the "whole congeries of facts." NLRB v. Entwistle Mfg. Co., 120 F. 2d 532 (C. C. A. 4th 1941). A finding of fact may not rest solely on such technically incompetent evidence. See NLRB v. Bell Oil & Gas Co., 98 F. 2d 870 (C. C. A. 5th 1938). See Summers, *What Constitutes a Fair Procedure before the National Labor Relations Board?,* 41 Mich. L. Rev. 595, 619 (1943).

decision. Hearsay may well be the most abundant and still the most cogent evidence to establish the existence of an unfair labor practice, and other competent evidence be largely unavailable.[48] Even so, in reviewing the Board's decisions, the Courts have maintained that ". . . this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." [49] But this is more directed to the criteria for judicial review, which will be discussed later. The treatment of hearsay evidence was characteristic of that accorded the various other categories which form the panoply of the "rules of evidence." Another advantage of the Board's practice was in the assistance which it gave in permitting the many uneducated and illiterate witnesses who testified before it to comprehend what was occurring, and in the elicitation from them of any information relevant to the proceedings.[50] The judge in the court room presides over the contest of the hired champions and his primary function is to preserve the elements of "fair-play," by permitting no unfair influencing or misleading of the jury. The Trial Examiner in an unfair labor practice hearing has an interest in developing as full an account of the case as he can. Appreciating this distinction, the Attorney General's Committee had endorsed the relaxation of technical rules in favor of elasticity and dispatch, stressing the need "to keep open the channels for the reception of all relevant evidence which will contribute to an informed result." [51]

The Administrative Procedure Act: Section 7 (c) of the Administrative Procedure Act adopted as its evidence foundation the "reliable, probative, and substantial" standard. As a matter of policy only, it requires every agency to exclude irrelevant, immaterial, or unduly repetitious evidence, but does not expressly invalidate proceedings where such evidence is admitted.[52] It is doubtful that the Administrative Procedure Act was intended in any degree to fetter the agencies with the technicalities of the rules of evidence.

The Taft-Hartley Act: The Taft-Hartley Act departs completely from the customary evidentiary requirements of administrative tribunals and goes far beyond whatever changes the Administrative Procedure Act may, upon fuller judicial interpretation, be held to demand. Section 10 (b), devoted to the prevention of unfair labor practices provides that "any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the

48. See BROOKS, UNIONS OF THEIR OWN CHOOSING, AN ACCOUNT OF THE NATIONAL LABOR RELATIONS BOARD AND ITS WORK 208 *et seq:* (1939) for a description of the "whispering campaign" techniques adopted by some companies, which, although effective in interfering with the § 7 rights of employees, might well not be discoverable through the orthodox admissions of the rules of evidence.

49. Consolidated Edison Co. v. NLRB, 305 U. S. 197, 230 (1938). See Davis, *An Approach to Problems of Evidence in the Administrative Process,* 55 HARV. L. REV. 364 (1942).

50. Madden, *Administrative Procedure: National Labor Relations Board,* 45 W. VA. L. Q. 91 (1939). For an analysis of six records of NLRB cases see Note, *Evidence Problems in NLRB Hearings and the Applicability of the Proposed Code of Evidence,* 55 HARV. L. REV. 820 (1942).

51. Final Report of AGCAP at pp. 70-71.

52. Nathanson, *supra* note 4, at 402. But see Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review,* 33 A. B. A. J. 434 (1947). See Pillsbury Mills, Inc., 20 LAB. REL. REP. (Lab. Rel. Ref. Man.) 1250 (NLRB 1947).

United States under the rules of civil procedure for the district courts of the United States. . . ." The congressional committee reports rationalize this provision as a restriction on the Board's practice of substituting its "expertness" for competent, legal evidence.[53] However, since that process is more concerned with drawing inferences from the evidence than with deciding what evidence is "legally" available for inference drawing, the reasons given are misleading. The gravest danger in any attempt to impose technical rules on an administrative body is that the respondents' lawyers may seek to fill a record with technical objections in order to try to get a greater percentage of reversals by the courts on insubstantial grounds.

Whether there will be any appreciable change from existing procedures, however, is open to question. Rule 43 (a) of the Federal Rules of Civil Procedure, is a liberal rule based on maximum admissibility. It provides that ". . . all evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs . . . the competency of a witness in federal courts shall be determined in like manner." [54]

The "Federal Equity" channel was originally regarded as the most promising medium for development free of the antiquated and irrational rules of the common law, since at the time of the adoption of Rule 43 (a) there was scant precedent in rulings on the admissibility of evidence under federal equity jurisdiction. A recent study of the fourteen cases in which it has since been applied, however, reveals that: ". . . these hopes for the utilization of this provision toward the evolution of a modern body of federal evidence rules, must be relegated to oblivion." [55]

The Trial Examiner will also be beset with complicated problems, for example, where the state rule is exclusionary and the Federal Equity source has no precedent.[56] What weight will a reviewing Federal court give to his decision on what the Federal rule should be; and what influence will the administrative environment have on the judicial development of the Federal Equity rules of evidence in these cases? A circuit court, sympathetic to the needs of the administrative process and specifically to a liberal policy of admissions in labor cases, may well sustain Board rulings in much the same way as it has hitherto, and as a consequence engraft administrative standards onto the judicial process. An unsympathetic court, on the contrary, may use the labor cases as a means of further narrowing the development of the Federal Equity source of evidence admission.

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53. So the House Committee: "Requiring the Board to rest its rulings upon facts, not interferences [sic], conjectures, background, imponderables, and presumed expertness will correct abuses under the act. The bill does this by providing in Section 10(b) . . . that 'so far as practicable,' the new Board's proceedings shall be conducted 'in accordance with the rules of evidence applicable in the district courts of the United States. . . .'" H. R. REP. No. 245, 80th Cong., 1st Sess. 41 (1947).

54. 28 U. S. C. foll. § 723c. (1940).

55. Note, 46 COL. L. REV. 267, 271 (1946). For an excellent appraisal of the problems implicit in Rule 43(a), see Green, *The Admissibility of Evidence under the Federal Rules,* 55 HARV. L. REV. 197 (1941).

56. See Green, *supra* note 55 *passim.* See also Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure,* 45 YALE L. J. 622 (1936).

The authors of the Taft-Hartley Act indicated some realization of these problems in including the phrase "as far as practicable" in their evidence conformity requirements, but the House Committee report glosses over the potential complexity with the statement that: "There is no such diversity in the rules of evidence among the several States as to make this clause unduly burdensome to the Board or to its trial examiners . . . and, in any event, an error in admitting or excluding evidence can be grounds for reversal only if it is substantial." [57] Rule 61 of the Federal Rules of Civil Procedure [58] supports the final statement of this comment, in making all errors in the admission or exclusion of evidence harmless unless the verdict, judgment or order of the court is "inconsistent with substantial justice." Nevertheless, it can probably be established that reversals would be allowed under Rule 61 on points that would have been considered technical in an administrative proceeding and insufficient cause for a reversal.

b) *The Preponderance of the Evidence*

Just as the introduction of technical rules of evidence into the administrative procedure of the NLRB seems ultimately directed to affect the judicial review of Board decisions, the new requirement that the Board's finding of an unfair labor practice be based on the "preponderance of the testimony taken," [59] apparently has the same objective and more specifically may look toward the nebulous fact-law dichotomy. The corresponding provision of the Wagner Act was that the Board's findings should be based on "all the testimony taken," and any problems which it might have posed were merged in the standards established for fact findings in judicial review. The preponderance criterion, if it is to be meaningful at all, concerns the degree of probability that certain inferences will be correct.[60] Thus, it could be concluded that where "equal probabilities" exist the test presumably would not be satisfied. It seems to be particularly aimed at situations where the Board's expert knowledge, derived from its handling of many similar fact situations, might otherwise tip the balance against the respondent. An example of this was in the Board's practice of handling company rules forbidding any kind of solicitation on the property of an employer.[61] If the Board decided that it

57. H. R. REP. No. 245, 80th Cong., 1st Sess. 41 (1947).

58. 28 U. S. C. foll. § 723c (1940).

59. Section 10(c) of the Act provides: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice . . ." etc.

60. See McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944).

61. So in Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945), the employer, well before any union activity had begun in his plant, adopted a general rule to the effect that: "Soliciting of any type cannot be permitted in the factory or offices." An employee who passed out union application cards to employees on his own time during the lunch periods was fired for infraction of the rule. The Board determined that the promulgation and enforcement of the rule violated § 8(c) of the NLRA and issued a cease and desist order, which included the rescission of the rule. In this and the companion case of NLRB v. LeTourneau Co. of Ga., 324 U. S. 793 (1945), the employers protested that the Board should not be allowed to substitute its knowledge of industrial relations for substantial evidence. The Supreme Court, in resolving the conflicts in the circuit courts, sustained the Board, on the theory that the presumption that such rules resulted in interference with the § 7 rights of the employees was "the product of the Board's appraisal of normal conditions about industrial establishments." The Board conceded that employer was privileged to adopt reasonable rules as to *working* time. Burnside Steel Foundry Co., 69 NLRB 128 (1946) (even though other company rules were not uniformly enforced). See Peyton Packing Co., 49 NLRB 828, 843 (1943). See also 9 NLRB ANN. REP. 57 (1944).

was as probable as not that such a blanket company rule was a camouflage for a motive to preclude any union solicitation, it found the rule to be an interference with the free exercise of the employees' rights. Under the Taft-Hartley Act a carefully drawn anti-solicitation rule may have a high chance of success in surviving the preponderance test and thus become an important weapon of the employer against union organization. It is by no means clear what relationship this provision of the Act bears to the substantial evidence test for fact findings on judicial review.[62] To reconcile the two provisions it has been suggested that the preponderance test applies only to the Board's "conclusions of law." This is, as usual, not a very helpful statement, since findings of fact and conclusions of law are generally inextricably intertwined in the process of inference in equivocal situations, and where a reviewing court has decided that certain elements of a case represent law rather than fact it has usually asserted its prerogative to undertake a full judicial review. It is difficult to prescribe, however, by what methods the court is to decide what it is going to treat as fact and what law.[63] As a matter of technique the conference report indicated that the statutory requirements of a preponderance meant that the Board's decisions should show on their face that an actual process of weighing the evidence had been gone through, by setting forth "the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that," and concluded that this mechanical process would result in "immeasurably increased respect for decisions of the Board." As indicated previously, it seems more likely that together with the rules of evidence, the preponderance test will allow for enlarged powers in the reviewing court and create less stability in Board decisions. The requirement of "a preponderance of the testimony taken" smacks more of the phrasing of an instruction for a jury than of a useful check on an administrative body.[64]

c) *Judicial Review*

The Wagner Act: Section 10 (c) of the Wagner Act provided that upon judicial review of a Board decision: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." The Supreme

62. So for example in NLRB v. Reynolds Int'l Pen Co., 13 CCH LAB. CAS. ¶ 63,872 (1947), the seventh circuit court appears, characteristically, to have gone through a process of orthodox judicial balancing in describing the Board's inferences as highly speculative. The Board's conclusions seem to have had a high probability of correctness. Consider also the attitude of the Seventh Circuit Court in NLRB v. Perfect Circle Co., 162 F. 2d 566 (C. C. A. 7th 1947), Wyman Gordon Co. v. NLRB, 153 F. 2d 480 (C. C. A. 7th 1946), and Wilson & Co. v. NLRB, 126 F. 2d 114 (C. C. A. 7th 1942).

63. See Brown, *Fact and Law in Judicial Review,* 56 HARV. L. REV. 899 (1943). "In numerous decisions courts have held that the specific issues involved were questions of fact or questions of law. But definite criteria for ascertaining confidently which is which prior to court decision have not yet developed." Final Report of AGCAP at p. 88

64. That the Administrative Procedure Act has potentialities of being interpreted to require some kind of a "preponderance" test was made apparent by the sixth circuit court in NLRB v. Thompson Products, Inc., 12 CCH LAB. CAS. ¶ 63,806 at p. 71,172 (1947). The court followed the findings of the Board "upon matters in which they are supported by substantial testimony," but declared that "upon matters upon which it made no findings, we have followed the undisputed testimony. We think this is the purport of the provision in the Administrative Procedure Act . . . that the reviewing court . . . shall 'review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.'"

Court in the *Jones & Laughlin* [65] case upheld the constitutionality of this provision along with the other procedural provisions of the Act, and in 1938, in *Consolidated Edison Co. v. NLRB*,[66] the court interpreted the provision to require support by *substantial* evidence, a concept which was described as being ". . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." This standard has been restated in a variety of ways, most of them recognizing its requirements as characteristic of the administrative norm.[67] Recalcitrant courts, however, felt themselves required thereby to reach conclusions of "shocking injustice" [68] on evidence which "strained their credulity." [69] This hostility to the Board's fact-finding autonomy occasionally expressed itself in the fanciful view that in any judicial balancing of the Board's findings the court was compelled to ignore completely the relative position of the balance on the employer's side and if it found a scintilla-plus-epsilon of evidence on the employee's side this was enough to demand the sustaining of a Board decision against the employer. Support for this position was argued from two decisions of the Supreme Court which discussed only the evidence in support of the Board's findings.[70] However, the Supreme Court never subscribed to the opinion that the mass of countervailing testimony in favor of the employer would not be used to diminish the substantiality of the evidence on the other side. The catch-phrase of the critics of the Wagner Act was that the courts had in some instances "abdicated" to the Board. This "abdication," it was urged, extended even into the sacred domain of mixed questions of law and fact, or resulted in the sustaining of "unsupported inferences," or deference by the courts to the "presumed expertness" of the Board.[71]

In evaluating these criticisms it cannot be overemphasized that the National Labor Relations Board, by reason of its specialization and concentration on its specific statutory problems, necessarily acquired an expert comprehension of the general framework of the industrial relations within its domain. Its knowledge of the background,[72] and the patterns into

65. 301 U. S. 1 (1937).

66. 305 U. S. 197 (1938). But see Nathanson and Lyons, *Judicial Review of the National Labor Relations Board,* 33 ILL. L. REV. 749, 751 (1939): "In drawing the fine line between deference and abdication, the customary formulas that there must be substantial evidence to support the findings, that the discretion granted must not be abused, give some apparent comfort but very little real aid."

67. NLRB v. Link-Belt Co., 311 U. S. 584 (1941); NLRB v. American Laundry Machinery Co., 152 F. 2d 400 (C. C. A. 2d 1945); Cudahy Packing Co. v. NLRB, 118 F. 2d 295, 303 (C. C. A. 10th 1941).

68. Wilson & Co. v. NLRB, 126 F. 2d 114 (C. C. A. 7th 1942).

69. "Though it may strain our credulity, if it does not quite break it down, we must accept it; and . . . regardless of what might have been our own conclusion, we are not prepared to say that no rational person could have come to the same conclusion." NLRB v. Columbia Products, 141 F. 2d 687, 688 (C. C. A. 2d 1944).

70. NLRB v. Bradford Dyeing Ass'n, 310 U. S. 318 (1940); NLRB v. Waterman Steamship Corp., 309 U. S. 206 (1940). See Stason, *Substantial Evidence in Administrative Law,* 89 U. OF PA. L. REV. 1026 (1941).

71. The House Committee stated that: "Anything more than a 'modicum,' a 'scintilla' of evidence is enough, or the Board may rely upon 'inferences,' 'imponderables,' 'background material,' or 'the whole congeries of fact.' . . . However repugnant to the courts the Board's decisions may seem, the act, by making the Board in effect its own Supreme Court so far as its findings of fact are concerned, renders the courts all but powerless to correct the Board's abuses." H. R. REP. No. 245, 80th Cong., 1st Sess. 41 (1947).

72. In NLRB v. Trojan Powder Co., 135 F. 2d 337 (C. C. A. 3d 1943), the background of the employer's activities in 1941 was derived from the observation of similar conduct on his part in 1936, coincident with organizing campaigns first by the A. F. of L. and later by the C. I. O. For a court's distrust of background as a basis

which certain fact situations inevitably began to fall [73] was far from being as mythical or mysterious as its opponents made out. The unfair labor practice of an employer does not have to be as crude as the Mohawk Valley Formula [74] in order to succeed in restricting the free development of the bargaining process. The employer has at his command many subtle methods, which because of their very subtlety are difficult to prove as being aimed at interference with the guaranteed rights of employees. For example, the statements of supervisory employees or of any employees who might be regarded as speaking for the employer; [75] the pre-election speech of the employer expressing his hostility to organized labor; [76] the blanket company rule against solicitation; [77] the discharge, purportedly for cause, of an active union member [78]—these and innumerable others are the factors with which employees have had to contend in seeking to establish or preserve their rights. The "background" of a case as an indication either of an employer's general attitude towards unionization or of his specific technique in an individual case could scarcely be ignored where he could achieve his effect with words chosen "with a fine sense of Victorian delicacy." [79]

It is against this framework that the process of proof and the weight of the Board's findings must be viewed. "Substantial evidence" is meaningful, not to the extent that a number of synonyms can be found for it, but only in relation to the paramount policies which the NLRB is directed to administer and against the background of a multitude of fact situations. Thus, wherever there was rational and probative evidence to support the facts found by the Board, the reviewing court was generally precluded from substituting its own judgment for that of the Board and supplanting such findings with another set of possible inferences. "The possibility of drawing either of two inconsistent inferences" did not leave the Board impotent to draw one of them.[80] Thus for the NLRB fact-finding was its special province, checked by most courts only against arbitrary or capricious administrative action.[81]

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for findings of fact see NLRB v. Union Pacific Stages, 99 F. 2d 153 (C. C. A. 9th 1938). The Supreme Court has held that the Board is not precluded from going behind a settlement agreement which it had previously approved to find evidence of a *subsequent* unfair labor practice. Wallace Corp. v. NLRB, 323 U. S. 248 (1944). See NLRB v. Link-Belt Co., 311 U. S. 584, 588 (1941).

73. 3 NLRB ANN. REP. 81 (1938).

74. A description of this technique of conducting an anti-union campaign appears in Remington Rand, Inc., 2 N. L. R. B. 626 (1937).

75. International Ass'n of Machinists, Tool and Die Makers Lodge v. NLRB, 311 U. S. 72 (1940). Note that § 2(13) of the Act states that: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This definition, primarily designed to affect union responsibility for "wildcat" strikes, will also have an effect on the process of proving employer responsibility for the activities of supervisory and other employees much the same as under the Wagner Act.

76. But see NLRB v. American Tube Bending Co., 134 F. 2d 993 (C. C. A. 2d 1943), *cert. denied,* 320 U. S. 768 (1943), where the Board was reversed on its finding that a pre-election expression of the employer's attitude was coercive.

77. See note 61 *supra.*

78. NLRB v. Botany Worsted Mills, Inc., 106 F. 2d 263 (C. C. A. 3d 1939).

79. *See* NLRB v. Trojan Powder Co., 135 F. 2d 337, 339 (C. C. A. 3d 1943).

80. *See* NLRB v. Nevada Consolidated Copper Co., 316 U. S. 105, 106 (1942).

81. One of the finest expositions of the premises on which administrative fact finding techniques and authority operate, is found in Timberg, *Administrative Findings of Fact,* 27 WASH. U. L. Q. 62-82, 169 (1941).

The Administrative Procedure Act: Section 10 (e) of the Administrative Procedure Act, pertaining to the scope of judicial review, has been read in conjunction with the provision of § 7 (c) which adopts the standard of "reliable, probative and substantial evidence." Together they have been thought to do no more than restate the general standards of those administrative tribunals which have followed "substantial evidence" as a guide.[82] The conference report on the Taft-Hartley Bill expressed the opinion that the Administrative Procedure Act was "intended to require the courts to examine the decisions of administrative agencies far more critically than has been their practice in the past," but decided that the conflicts in its interpretation required a clear statement in the new labor law of the standards which were to be adopted.[83]

The Taft-Hartley Act: In view of this it seems strange that Section 10 (e) of the Taft-Hartley Act does no more than state that: ". . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole are conclusive. . . ." This changes the Wagner Act in what must have been considered to be two significant respects. "Questions of fact" is supposed to clarify "the facts" in such a way as to exclude "questions of law," and "the record as a whole" obviates the risk that the employer's side of the evidence will be disregarded in the relative criteria of substantiality. However, it says little more than the Wagner Act, which had the same operating presumptions. It was in a spirit of dissatisfaction with decisions of the Supreme Court like those in the *Hearst* [84] and *Packard* [85] cases, which seemed to leave to the discretion of the Board the scope of the definition of the term "employee" under the Wagner Act for certain purposes (to opponents of the decisions a pure question of law), that one of the changes seems to have been made. It is dubious whether the categorizing of such questions under the "law" side of the dichotomy would have led to any difference in result. Ultimately the decision depends on how important the members of the Supreme Court think that the policy-making power of the Board is, in a particular pattern of events.[86]

In two important respects the substantive changes of the Taft-Hartley Act may affect the process of proof and the Board's power of fact-finding. Section 8 (c) provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." The legislative history of this provision indicates that it was intended to preserve the employer's right of free speech.[87] Under the Wagner Act the Board

82. Nathanson, *supra* note 11, at 417. For an opposing view see Dickinson, *Administrative Procedure Act, Scope and Grounds of Broadened Judicial Review,* 33 A. B. A. J. 434 (1947).

83. Conference Committee Report on Labor Management Relations Bill, 1947 (H. R. 3020) at p. 29.

84. NLRB v. Hearst Publications, 322 U. S. 111 (1944), 57 HARV. L. REV. 1112 (1944).

85. Packard Motor Car Co. v. NLRB, 67 Sup. Ct. 789 (1947), 95 U. OF PA. L. REV. 802 (1947).

86. See Brown, *Fact and Law in Judicial Review,* 56 HARV. L. REV. 899 (1943). DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 55 (1927). In Medo Photo Supply Corp. v. NLRB, 321 U. S. 678 (1944), the Court stated that on questions of law "the experienced judgment of the Board is entitled to great weight."

87. H. R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947); SEN. REP. No. 105, 80th Cong., 1st Sess. 23 (1947).

had included, as evidence of employer unfair labor practices, utterances containing implied threats, or utterances which were "an integral part of a course of anti-union conduct" to be evaluated in their context, and had developed what came to be known as the "captive audience" doctrine.[88] Apparently any finding on these bases alone, without a finding of threat or promise of benefit on the face of the utterance, can now be reversed by a reviewing court. This absolute evidentiary immunity is strange, and should be another important factor in making employer unfair labor practices more difficult to prove. It may be, however, that it will be so construed as to give a corresponding immunity to peaceful picketing when otherwise such picketing might be the only evidence of a proscribed unfair labor practice on the part of a union.[89]

The other provision is that part of Section 10 (c) which states that: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." Where equally possible inferences can be drawn that an employee was discharged for cause or on a discriminatory basis, or even where there was a superimposition of motives, the reviewing court might now assume that it is within the scope of its authority to substitute its own conclusion for that of the Board.[90]

Summary: Taken in the aggregate, together with the changes as to the rules of evidence and the preponderance test, the provision for judicial review of findings of fact indicates that the Taft-Hartley Act is designed to give reviewing courts a much more active role than they had hitherto enjoyed in this field.[91] Moreover, the shift in the required standards of proof presages greater difficulty in the ability to prove unfair labor practices both on the part of employers and of employees. The employees' problems of proof have already been adverted to. The list of unfair labor practices of labor organizations in Section 8 (b) of the Act contains many vague terms and introduces an untried field in the area of national labor relations. Regarding these practices especially, to have a flexible power to adjust evidentiary standards to important considerations of policy would seem more desirable than to leave their establishment to the fluctuating sympathies of the courts.

EVALUATION

The administrative changes of the Taft-Hartley Act as a whole seem to have been motivated by an accumulation of dissatisfactions with particular practices and policies of the NLRB, which it developed under its interpretation of what was necessary to effectuate the policies of the Wagner Act. They do not appear to be the result of a coherent theory of how the administrative machinery should be improved, so much as a patch-

88. NLRB Press Release R-6175 (1946). See NLRB v. Virginia Electric & Power Co., 314 U. S. 469 (1941). The "captive audience" doctrine was sustained by the second circuit in NLRB v. Clark Bros., 20 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2436 (1947).

89. See Note, 96 U. OF PA. L. REV. 85, 87 (1947).

90. 20 LAB. REL. REP. (Labor-Management) 99 (1947).

91. See Iserman, *The Labor-Management Act: New Law as to Evidence and the Scope of Review,* 33 A. B. A. J. 760 (1947), for an anticipation of greatly increased powers in the courts to review decisions of the NLRB. The author of this article goes so far as to suggest that questions of law which the reviewing court has full power to determine include such vague concepts as "what acts 'interfere with,' 'restrain' or 'coerce' employees, whether or not an employer 'dominates' a union and many others . . .," the courts becoming as "expert" as the Board in such matters.

work composed of devices aimed at achieving different results in specific fact situations, and at impeding the Board's activities in establishing uniform and comprehensive policies in the field of national labor relations. Such experimentation, with its deviations from standards already tested for efficiency and fairness,[92] does not seem to be either a desirable or a practical means for promoting that stability in industrial relations which is the ultimate objective of the Act.

A. M. F.

Labor's Economic Weapons and the Taft-Hartley Act

"To count the cost of union weapons is to count the cost of free competition in industrial controversy." [1]

In 1935 the Wagner Act [2] expressed and provided the machinery for developing a national labor policy which was designed to bring within the bargaining arena of a capitalist economy persons whose share of the national income was determined by forces beyond their control.[3] The policy: collective bargaining; the method: labor organization. The Taft-Hartley Act [4] is designed largely to regulate and restrict various devices through which labor makes effective the economic power-potential it has gained through organization and combination. It is the purpose of this Note to analyze in the light of their legal and practical effects the limitations placed on organized labor's privilege to engage in concerted activities for the purpose of securing economic advantage. In evaluating herein any innovation made by the Act the ideal of collective bargaining will always be the point of reference.

Restrictions on Strikes, Picketing, and Boycotts

Picketing and Strikes as "Restraint" and "Coercion": Section 7 of the Wagner Act [5] announced the right of employees to "self-organization,

92. Mr. Gerard D. Reilly, who is regarded as having been responsible for the major part of the drafting of the new Act, stated in an address at New York University early in 1947 that: "I think what I have said indicates that on the whole procedures before the National Labor Relations Board do conform to the general standards prescribed by the Administrative Procedure Act. As compared to many agencies of the government, which fail to separate the functions of investigator and judge or to afford applicants copies of their precedents, the Board is a model of administrative virtue." Reilly, *The Labor Board and the Administrative Procedure Act* in The Federal Administrative Procedure Act and the Administrative Agencies (Warren ed. 1947).

1. Frankfurter and Greene, The Labor Injunction 205 (1930); see also Holmes, J., dissenting in Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N. E. 1077, 1081 (1896).

2. 49 Stat. 449 (1935), 29 U. S. C. § 151 (1940). Hereafter all references to the Wagner Act will be by section only.

3. See Frey, Cases on Labor Law, c. I (1941).

4. 61 Stat. —; 29 U. S. C. A. § 151 (Cumulative Pamphlet 1947). All references to the Taft-Hartley Act will hereafter be by section only. Sections 1-102 (Title I, § 1) —Amendment of National Labor Relations Act; Sections 201-212 (Title II)—Conciliation of Labor Disputes in Industries Affecting Commerce; National Emergencies; Sections 301-305 (Title III)—Suits by and Against Labor Organizations; Sections 401-406 (Title IV)—Creation of Joint Committee to Study and Report on Basic Problems Affecting Friendly Labor Relations and Productivity; Sections 501-503 (Title V)—Definitions. The short title of the Act: "Labor-Management Relations, 1947" (§ 1(a)).

5. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choos-

to form, join, or assist labor organization, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining. . . ." Our national labor policy was keyed to implement the rights guaranteed in that section. The Taft-Hartley Act amends the section by appending a new "right"—"the right to refrain from any or all of such activities. . . ." [6]

The employee's protection from infringement of his new "right" is found in the section making it an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7." [7] The thesis of the proponents of the legislation is centered on a concept of "equality," [8] that because it is an unfair labor practice for an employer to "restrain or coerce" his employees in the exercise of their section 7 rights,[9] so it should be an unfair labor practice for a union to engage in similar activity.[10] If the national labor policy, however, is still to encourage collective bargaining,[11] recognizing that there is no real equality between employer and employee unless the latter is organized, it is quite proper and in conformity with that policy to prohibit an employer from exerting pressure on an employee as an inducement not to join a union and to remain, therefore, without bargaining power. But by similarly preventing a labor organization from putting pressure on employees to join with their fellow workers in an effort to secure a bargaining position, the national policy is subjected to serious impediment by the very Act which gives it continued expression.[12]

"Restrain" and "coerce" are not words capable of factual definition in our jurisprudence, but are legal conclusions, words of art. The view was expressed in Senate debate that, in addition to threats, false promises, false statements, physical compulsion, and "goon squad" action, their prohibitive scope ought to include peaceful picketing.[13] If the section had been designed to prevent only those activities of labor unions which go beyond "fair persuasion," [14] the legislation would have been unnecessary; the civil and criminal remedies are fast and sure.[15] It would not seem improbable, therefore, to expect litigation in which an attempt will be

ing, and to engage in concerted activities, for the purpose of collective bargaining or other mtual aid or protection." Wagner Act, § 7.

6. ". . . and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." Taft-Hartley Act, § 7. For an analysis of the section 8(a)(3) "exception," see Note, *Union Security Devices and the Taft-Hartley Act,* 96 U. OF PA. L. REV. 101, 110 (1947).

7. Section 8(b)(1). *Cf.* § 8(a)(1).

8. See speech by Senator Taft, 93 CONG. REC. 4142 (April 25, 1947).

9. Section 8(a)(1).

10. See speech by Senator Ball, 93 CONG. REC. 4136 (April 25, 1947).

11. The new "Findings and Policies" of the Taft-Hartley Act reiterate collective bargaining as a goal to be achieved. See § 1.

12. *See* Park and Tilford v. International Brotherhood of Teamsters, 27 Cal. 2d 599, 610, 165 P. 2d 891, 898 (1946).

13. See speech by Senator Ball, 93 CONG. REC. 4136-4138 (April 25, 1947).

14. "(1) As used in this Chapter, 'fair persuasion' means argument, exhortation or entreaty addressed to a person without

(a) threat of physical harm or economic loss, or
(b) molestations or harassment, or
(c) material and fraudulent misrepresentation.

(2) Picketing at or near another's place of business for the purpose of persuading third persons, in accordance with the standards stated in Subsection (1), to adopt a course of conduct toward his business is a form of fair persuasion of the third persons if access to the place of business is not materially obstructed thereby." RESTATEMENT, TORTS § 779 (1939).

15. See argument of Senator Ives in 93 CONG. REC. 4141 (April 25, 1947).

made to include peaceful picketing within the definition of "coercion." [16] As recently as 1946 the Court of Chancery in New Jersey voiced the proposition that ". . . all picketing is coercive in its nature and is intended so to be." [17] The Wisconsin Employment Relations Board found that peaceful picketing of a non-union contractor, the object of which was to induce the workers to join a union, was "unlawful coercion" [18] and an unfair labor practice under a section of the Wisconsin statute [19] similar to the section of the Taft-Hartley Act under discussion. However, the constitutionality of the Wisconsin Board's interpretation and order is in serious doubt. The *Swing* [20] and *Angelos* [21] cases which identify peaceful picketing with free speech would appear to justify a reversal of the Board's order and will probably prevent peaceful picketing per se from inclusion within the scope of "coercion" and "restraint" if the section is to be held constitutional.[22] In fact continued identification of picketing with free speech may render inadmissible even as mere *evidence* of coercion testimony as to the existence of picketing.[23]

Strikes to induce co-workers to join a particular union probably will not be found coercive in view of section 13 which provides that nothing in the Act shall be construed to interfere with the right to strike "except as specifically provided." [24] Yet the *threat* to strike for such an objective has been found "coercive" [25] and may be subject to a similar finding under the Taft-Hartley Act.[26]

Constitutional aspects of the free speech doctrine notwithstanding, section 8 (b) (2) would seem to make an unfair labor practice of picketing designed to cause an employer to discriminate against an employee who refuses to join a labor organization.[27] Strikes, however, not being specifically referred to in the section, would appear to be beyond its scope.[28]

16. See speech by Senator Ball, 93 CONG. REC. 4138 (April 25, 1947).

17. Ukranian Home v. Bartenders Union, 19 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2242 (N. J. Ch. 1946).

18. Waterway Engineering Co. v. Olsen, 20 LAB. REL. REP. (Lab. Rel. Ref. Man.) 1013 (Wis. ERB 1947).

19. 2A CCH LAB. LAW SERV. ¶ 41,070 (Wis. 1947). The CCH LAB. LAW SERV. will be cited for all recent state legislation.

20. American Federation of Labor v. Swing, 312 U. S. 321 (1941).

21. Cafeteria Employees' Union v. Angelos, 320 U. S. 293 (1943).

22. For discussions of the extent of the free speech doctrine, see Dodd, *The Supreme Court and Labor 1941-1945,* 58 HARV. L. REV. 1018, 1054-1060 (1945); Jaffee, *In Defense of the Supreme Court's Picketing Doctrine,* 41 MICH. L. REV. 1037 (1943); Teller, *Picketing and Free Speech,* 56 HARV. L. REV. 180 (1942); Dodd, *Picketing and Free Speech: A Dissent,* 56 HARV. L. REV. 513 (1943).

23. Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." See Note, *The Taft-Hartley Act—An Administrative Chimera,* 96 U. OF PA. L. REV. 67, 84 (1947).

24. "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Section 13.

25. Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327 (1903).

26. See speech by Senator Ball, 93 CONG. REC. 4137 (April 25, 1947).

27. Section 8(b) (2) makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3). . . ." The implications of this section are discussed fully in Note, *Union Security Services and the Taft-Hartley Act,* 96 U. OF PA. L. REV. 101, 112 (1947).

28. See note 24 *supra.*

Secondary Boycotts: No legal concept has been subject to more varied definition than has "secondary boycott." [29] The Taft-Hartley Act very wisely omits the term. It instead describes factually those concerted activities of labor unions, designed to put economic pressure on Employer A by the exertion of pressure on employer B, which activities it proscribes.[30] For the sake of brevity the term "secondary boycott" will be employed in this Note, but will refer only to those "illegal" activities which the Act factually describes.

It has been made an unfair labor practice for any labor organization "to engage in, or to induce or encourage the employees of any employer to engage in, a strike [31] or a concerted refusal" to work on or handle goods or perform services where the object of such concerted activity is to induce an employer to refuse to deal in the products of, or to sever his business relations with, "any other producer, processor . . . manufacturer . . . or other person." [32] This provision against "secondary boycotts" goes farther than any other piece of federal legislation in limiting the legitimate area of economic conflict.[33] Included within the proscribed area, for example, would be a strike by carpenters to prevent the use of wood processed in a plant which refuses to recognize the bargaining agent of its employees, or refuses to grant a "union shop" [34] although requested to do so by a majority of its employees. The most frequent use of the "secondary boycott" has been in the building construction trades where unionized workers have consistently refused to work on non-union materials [35]—and this despite the fact that prior to the passage of the Norris-La Guardia Act [36] the federal injunction struck out relentlessly at so effective a weapon for achieving unionization.[37] Those opposed to the

29. *See* MILLIS AND MONTGOMERY, ORGANIZED LABOR 583 (1945); FRANKFURTER AND GREENE, *op. cit. supra* note 1 at 42 (1930); OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS 602 *et seq.* (1927); LAIDLER, BOYCOTTS AND THE LABOR STRUGGLE 64 (1913); ADAMS AND SUMNER, LABOR PROBLEMS 196-197 (1905). For an excellent bibliography of materials on labor boycotts, see W. P. A. OFF. PROJ. 465-97-3-18, THE LABOR BOYCOTT—A BIBLIOGRAPHY (2d ed. 1938).

30. Section 8(b)(4), (A) and (B).

31. Section 501(1) defines a strike as "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees." The constitutionality of any order directed against a "strike" will no doubt be the subject of litigation. So long as the order is directed only against the strike leaders or the labor organization, the constitutional barrier will probably be surmounted. Section 502 indicates the Congressional intent not to require an individual employee to render labor or service without his consent. But see International Union v. Wis. E. R. B., 12 CCH LAB. CASES ¶ 68,843 (Wis. Sup. Ct. 1947), in which an order restraining employees from engaging in work stoppages was upheld. See Keefer, *Has a Person a Constitutional Right to Abstain From Work?*, 29 W. VA. L. Q. 20 (1922).

32. Section 8(b)(4)(A).

33. Senate debates for and against the limitations imposed are found in 93 CONG. REC. 4321, 4322 (April 29, 1947).

34. Problems of the closed shop, union shop and other union security devices are beyond the pale of this Note. They are fully discussed in Note, *Union Security Devices and the Taft-Hartley Act*, 96 U. OF PA. L. REV. 101 (1947).

35. See MILLIS AND MONTGOMERY, *op. cit. supra*, note 29 at 584.

36. 47 STAT. 73 (1932), 29 U. S. C. § 113 (1940). Hereafter the Norris-La Guardia Act will be referred to by section only.

37. FRANKFURTER AND GREENE, *op. cit. supra*, note 1 at 43. *See* Bedford Cut Stone Co. v. Journeyman Stone Cutters Ass'n., 274 U. S. 37 (1927). The Supreme Court decisions in the cases of Lawlor v. Loewe, 208 U. S. 274 (1907), Loewe v. Lawlor, 235 U. S. 522 (1914) (the Danbury Hatter cases), Duplex Printing Co. v. Deering, 254 U. S. 443 (1921) and the *Bedford Cut Stone* case made necessary the Norris-La Guardia Act to take from the federal courts power to enjoin secondary strikes. Prior to that Act lower federal courts felt constrained, often with reluctance, to let an in-

provision in the Taft-Hartley Act banning such "secondary" activity point to the fact that concerted refusals to handle non-union made materials have resulted in the gradual elimination of any competitive advantage based solely on lowered wage standards.[38] Its proponents, on the other hand, urged as decisive a desire to remove the pressure of strikes from those who merely continue to do business with employers involved in a dispute with their employees over wages or recognition.[39] Courts which, at common law, enjoined strikes against non-union materials similarly based their decisions on a finding of unjustified pressure on an "innocent" third party (yet rarely did the injunction issue at the instance of anyone but the non-union employer engaged in the "primary" dispute).[40]

It should be realized that the Taft-Hartley Act's broad prohibition against "secondary" strikes does not distinguish between the situation in which the "primary" processor of the non-union materials may be engaging in an unfair labor practice from that in which he is engaged merely in an economic dispute with his workers over wages and other conditions of employment.

The Act defines as unfair labor practices not only secondary *strikes,* but also *inducements* so to strike.[41] Even if picketing is found to be such an inducement, a cease and desist order based on the finding may fail to meet the test of constitutionality, since in the case of *Bakery & Pastry Drivers, etc. Local v. Wohl*[42] the free speech doctrine was extended to include "secondary" picketing.[43]

The prohibition against strikes or inducements to strike applies to those which are designed to put pressure on any *"other* producer, processor, or manufacturer . . . or other person,"[44] i. e., other than the striker's *own* employer. A worker's "employer" may be defined narrowly as the

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junction issue. See, *e. g.,* Aeolian Co. v. Fischer, 40 F. 2d 189 (C. C. A. 2d 1930). *But cf.* Paine Lumber Co. v. Neal, 244 U. S. 459 (1917).

38. See statements of William Green, President of the A. F. L., *Hearings before Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22,* 80th Cong., 1st Sess. 981 (1947).

39. See speech by Senator Taft, 93 CONG. REC. 4323 (April 29, 1947).

40. See Hellerstein, *Secondary Boycotts in Labor Disputes,* 47 YALE L. J. 341, 345 (1938). Examples of injunctions issuing from state courts at common law against activities such as are now proscribed by the Taft-Hartley Act are found in Snow Iron Works v. Chadwich, 227 Mass. 382, 116 N. E. 801 (1917); Purvis v. United Brotherhood, 214 Pa. 348, 63 Atl. 585 (1906); Schlang v. Ladies Waist Makers Union, 67 Misc. 221, 124 N. Y. Supp. 289 (Sup. Ct. 1910). Damages were recovered in Bricklayers' Union v. Ruff, 160 Md. 483, 154 Atl. 52 (1931). See Bryan, *Proper Bounds of the Use of the Injunction in Labor Disputes,* 36 ANNALS 288-301 (1910).

Legality of a strike at the "primary" level has often depended, at common law, on whether its objective has been for union security or more immediate economic advantages. At the "secondary" level, however, the objective has been relatively unimportant. If the objective at the "primary" level was "lawful," illegality at the "secondary" level was determined by factors *other* than purpose. If a strike at the "primary" level was "unlawful," it would, *a fortiori,* be "unlawful" at the secondary level. Barnard and Graham, *Labor and the Secondary Boycott,* 15 WASH. L. REV. 137, 144 (1940).

41. Section 8(b)(4)(A).

42. 315 U. S. 769 (1942). *But cf.* Carpenters Union v. Ritter's Cafe, 315 U. S. 722 (1942).

43. The constitutionality of an order restraining "secondary picketing" under the California statute (2A CCH LAB. LAW SERV. ¶ 43,405 (Cal. 1947)) has been twice before lower courts. In New Pacific Ry. v. Lumber Union, 19 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2025 (Cal. Super. Ct., Humbold County 1946) it was held to deny the constitutionally protected right of "free speech." In New Pacific Ry. v. Lumber Union, 19 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2200 (Cal. Super. Ct., Sonoma County 1946) a restraining order was upheld.

44. Section 8(b)(4)(A) (italics supplied).

person or corporate entity from whom he receives his wages. There is precedent, however, for defining "employer" more broadly.[45] The problem has arisen in the past in one of two ways. In certification proceedings before the Board, for example, all the associations of longshoremen employers of the Pacific Coast were found to constitute a single "employer" and were certified as a proper "employer unit" for bargaining purposes.[46] The problem has arisen also where an unfair labor practice has been charged and several parties respondent have been made the object of a complaint directed against the "employer" of the charging employees.[47] Where a "single integrated business" is found,[48] where one corporate entity is wholly owned by another [49] and where the labor policies are controlled by one of the two corporations,[50] the Board has not been prevented by corporate arrangements from arriving at a definition of "employer" consonant with the broad policies of the N. L. R. A. The tests most frequently applied have been identity of labor policy and unity of direction.[51] A finding that a lumber company is the employer of railroad workers is possible where the railroad and lumber company are commonly controlled through interlocking directorates.[52] In such a situation a strike by the rail workers against non-union made lumber may not be "unlawful." Similarly where two corporations are owned by one family, where the workers are frequently transferred from one plant to the other, and where the products begun in one plant are finished in the other, one court found a single "employer" for the workers of both corporate entities.[53]

The ideal of collective bargaining embodies negotiation between an employer and the representatives of the employees contained in a particular bargaining unit. If an impasse is reached and the bargaining takes the form of strike action, further secondary action by the employees would appear functionally to be unjustifiable, so long as the employer "sits it out," i. e. does not attempt to replace the strikers and does not invoke the aid of other employers to distribute his goods or complete his orders.[54]

45. Section 2(2) of the Wagner Act defined "employer" to include "any person acting in the interest of an employer." Section 2(2) of the Taft-Hartley Act defines him to include "any person acting as an agent of an employer." Although the new definition appears narrower, in view of § 2(13) which provides that in determining what constitutes an "agent" the question of whether "the specific acts were actually authorized or subsequently ratified shall not be controlling," the board or court will have to determine what *is* controlling and in so doing can arrive at a broad definition. The purpose of Congress in changing the definition of "employer" was to restrict the "unfair labor practice" liability of employers for the acts of their supervisory personnel. See H. R. REP. 510, 80th Cong., 1st Sess. (1947), U. S. C. CONG. SERV. ADV. SHEET No. 52-193.

46. Shipowners' Ass'n. of the Pacific Coast, 7 N. L. R. B. 1002 (1938), *aff'd.*, 308 U. S. 401 (1940).

47. *E. g.*, 41 N. L. R. B. 843 (1943); American Pearl Button Co., 52 N. L. R. B. 1113 (1943).

48. Pennsylvania Greyhound Lines, 1 N. L. R. B. 144 (1935), *enforced*, 303 U. S. 261 (1938).

49. Caleo Chem. Co., 13 N. L. R. B. 34 (1939).

50. Todd Shipyards, 5 N. L. R. B. 20 (1938).

51. Lewittes & Sons, Inc., 33 N. L. R. B. 29 (1941); Republic Steel Co., 26 N. L. R. B. 1244 (1940); Blue Ridge Shirt Mfg. Co., 70 N. L. R. B. 741 (1946); Chrysler Detroit Co., 38 N. L. R. B. 313 (1942); Middle West Corp., 28 N. L. R. B. 540 (1940). *But cf.* M. F. A. Milling Co., 26 N. L. R. B. 614 (1940); Markham & Callow, Inc., 13 N. L. R. B. 963 (1939).

52. Crossett Lumber Co., 8 N. L. R. B. 440 (1938).

53. N. L. R. B. v. Lund, 103 F. 2d 815 (C. C. A. 8th 1939).

54. See Frey, *The Logic of Collective Bargaining and Arbitration*, 12 LAW AND CONTEMP. PROB. 264, 269 (1947).

But what of the situation in which a struck baking corporation seeks to distribute its wares through a unionized restaurateur?[55] Is the restaurateur a "neutral" when he takes the order? If the baking corporation's employees induce the workers of the restaurateur to strike are they seeking to exert pressure beyond that envisaged by the concept of collective bargaining, or are they rather asking the restaurant workers not to act as strikebreakers?[56] The Act makes secondary strikes unfair labor practices without allowing the Board discretion to consider whether the employer's activities have become "secondary." It is suggested that legislative amendments be considered which will permit the N. L. R. B. to consider both the activities of the employer and the "neutral"; where an alliance exists between the two either it should be struck down, or privilege to engage in secondary activity should be granted the labor union involved.

Striking or inducing a strike where the object is to compel an employer other than the employer of the strikers to bargain with a labor union not certified by the Board, is made an unfair labor practice by section 8 (b) (4) (B).[57] The section covers in one broad sweep two situations which would seem to require different treatment: (a) where the employer has refused to bargain, having reasonable cause to believe the union has a majority, although it has not yet been certified; (b) where the union has been refused certification. When situation (a) exists, denying labor the privilege to strike against the "neutral" who deals with the "unfair" employer makes the "neutral's" employees unwilling aids to an unfair labor practice.

A common law injunction was avoided in *Ruff & Sons v. Bricklayers' Union*[58] where the union informed a contractor that its members would accept no jobs from him in the *future,* because of his past practice of subcontracting with contractors who refused to grant union recognition. Conceivably under the Taft-Hartley Act this device might effectively be used by a union in the building trades where employment is "by the job" without subjecting itself to a cease and desist order.

In situation (b), however, where the union has been refused certification, a cease and desist order against the strike would seem proper.[59]

What has already been said about the possibility of a constitutional barrier to the inclusion of picketing within the concept of "inducement to strike" applies to this section with equal force—perhaps with greater force—since the early "free speech" cases are factually more analogous to a situation in which an attempt is being made to proscribe picketing for unionization and recognition.[60]

Compelling the Employer to join an Association: Section 8 (b) (4) (A) makes an unfair labor practice of a strike, an inducement to strike, or a refusal to handle goods where the object of the concerted activity is to induce any employer "to join any labor or employer organization. . . ." Strikes for such an objective have infrequently occurred. Where they

55. See Field's Restaurant, Inc. v. Bernstein, 3 CCH LAB. LAW SERV. ¶ 63,703 (N. Y. Sup. Ct. 1947).

56. See Bryan, *Proper Bounds of the Use of the Injunction in Labor Disputes,* 36 ANNALS 288, 293 (1910); Frey, *supra* note 54, at 269.

57. Note 31 *supra.*

58. 163 Md. 687, 164 Atl. 52 (1933); *cf.* Bricklayers' Union v. Ruff, 160 Md. 483, 154 Atl. 52 (1931).

59. See discussion under "Jurisdictional Strikes" at 93 *infra.*

60. American Federation of Labor v. Swing, 312 U. S. 321 (1941); Thornhill v. Alabama, 310 U. S. 88 (1940). But see TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING §§ 123-140 (1940).

have occurred on a sufficiently large scale, they have been restrained. In *Allen-Bradley v. Local Union No. 3* [61] the Supreme Court found a Sherman Act [62] violation in strikes and boycotts designed to force employers to join an employers' combine. In that case the parties defendant were employers as well as labor unions, who had joined together to force the unwilling employer into their association. Despite the Norris-La Guardia Act the Seventh Circuit in 1936 enjoined picketing which induced milk drivers to cease dealing with an employer who refused to join a particular association.[63]

Where the purpose of putting pressure on an employer to join a particular association is to preserve an area monopoly in which all competition is stifled, as in the *Allen-Bradley* case, the union is engaging in activity beyond the scope encompassed by legitimate collective bargaining. Restraint in such a case seems justifiable. However, in situations in which the purpose is not to combine with employers for the objective of "monopoly" and employers are not part-and-parcel of the boycott schemes, justification is not quite so apparent. A large national or international union may have trained negotiators capable of bargaining effectively with an entire industry while the small locals may be incapable of achieving bargaining equality with a particular employer. Hence, if a strike is designed to force an employer to join an association of other employers in the same industry with whom the national or international may bargain, the relative bargaining ability of the employer and the locals should be considered relevant in determining whether or not a cease and desist order should issue.[64] Still a different situation arises when, in industries like tile laying, "bob-tailing," and milk-vending, it is customary to find many small, highly competitive entrepreneurs. Some employ a few workers; others employ no help at all. It would seem that in non-inflationary periods the desirability of preventing cut-throat price cutting, which would lead to wage-depression and a resultant diminution of purchasing power, is sufficiently important to justify strikes to induce a recalcitrant "employer" to join an association which will establish uniform standards of wages and hours.

Three situations have been discussed—two in which restraint is thought undesirable, one in which it is thought desirable. The Act, however, dictates the same result for all three situations and any others which may arise.[65] Though monopoly or price wars might be the result, a cease and desist order must issue upon the finding of a strike to compel an employer to join a particular association.

The "free speech" doctrine may again stand in the way of including peaceful picketing within the definition of "inducement to strike." The free speech cases are distinguishable factually from the situation covered by this section of the Act, but not philosophically.[66] In *Senn v. Tile Layers Protective Union* [67] in which the first identification of picketing

61. 325 U. S. 797 (1945).
62. 26 STAT. 209 (1890), 15 U. S. C. § 1 (1940).
63. Scavenger Service Co. v. Courtney, 85 F. 2d 825 (C. C. A. 7th 1936); *accord,* Converse v. Highway Construction Co. of Ohio, 107 F. 2d 127 (C. C. A. 6th 1939). *Contra:* Smithurst v. International Brotherhood, 20 LAB. REL. REP. (Lab. Rel. Ref. Man.) 2480 (N. Y. Sup. Ct. 1947).
64. *Cf.* HOUSE REP. 510, 80th Cong., 1st Sess., U. S. C. CONG. SERV. ADV. SHEET No. 52-206 (1947).
65. See BROOKS, UNIONS OF THEIR OWN CHOOSING 167 (1939) on the desirability of giving labor administrative boards wide discretion.
66. See note 22 *supra.*
67. 301 U. S. 468 (1937).

with free speech was made by the Supreme Court, the picketing was to compel a sole proprietor who had no employees to cease work and to hire union employees. He, himself, was not permitted to join any labor association. If picketing for such an objective is constitutionally protected, picketing to induce an employer to join a particular association would seem to be permissible.

Jurisdictional Strikes: Strikes, inducements to strike, and concerted refusals to handle goods, where the object is to force an employer to deal with union A after union B has been duly certified, have been made unfair labor practices.[68] Prior to the passage of the Taft-Hartley Act the remedy of the employer and certified union had been at best uncertain. The Supreme Court has never decided whether such strikes as are now proscribed are "labor disputes" within the meaning of the Norris-La Guardia Act.[69] The district court decisions are in conflict.[70] The State of Washington has held its anti-injunction statute inapplicable where there has been labor board certification.[71] If the Board certifies that union which best will serve the collective bargaining needs of the employees involved, the employer and the members of the majority union should be free from the pressure of strikes designed to force the employer to violate the certification order.[72] The Board must be wary, however. Workers on strike for higher wages or other economic concession are no longer permitted to vote in certification elections.[73] If the Board certifies a union selected largely by striker replacements in an election called at the instance of the employer,[74] the strikers returning to work could hardly be expected to accept the decision with equanimity.

The Act makes no mention of "primary" strikes called by union A, designed to force an employer to withdraw recognition from union B, an *un*certified union, which *may* nevertheless be a majority union. An injunction may not issue in federal court against such a strike.[75] The state courts are divided.[76] Superficially such strikes appear economically wasteful. Yet it has been pointed out that the very fact that there are two competing unions fighting for exclusive control signifies discontent

68. Section 8(b)(4)(C).

69. *Cf.* Lauf v. Shinner, 303 U. S. 323 (1938).

70. *Compare* Oberman & Co. v. United Garment Workers, 21 F. Supp. 20 (W. D. Mo. 1937) *with* American Chain & Cable Co. v. Truck Drivers, etc., Union, 68 F. Supp. 54 (D. N. J. 1946) *and* Yoerg Brewing Co. v. Brennan, 59 F. Supp. 625 (D. Minn. 1945).

71. Bloedel Donovan Lumber Mills v. International Woodworkers, 4 Wash. 2d 62, 102 P. 2d 270 (1940); see also Pando v. Bartenders' International Alliance, 37 Pa. D. & C. 169 (C. P., Fayette 1940). For a discussion of the problem generally, see Note, 33 ILL. L. REV. 717 (1939). For a discussion of the problem in absence of anti-injunction legislation, see Magruder, *A Half Century of Legal Influence upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071, 1107 (1937).

72. See Jaffe, *Inter-Union Disputes in Search of a Forum*, 49 YALE L. J. 424, 456 (1940).

73. "Employees on strike who are not entitled to a reinstatement shall not be eligible to vote." Section 9(c)(3). Employees on an "economic" strike are not entitled to reinstatement. *See* N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 345 (1938); *cf.* Kellburn Mfg. Co., 45 N. L. R. B. 322 (1942).

74. See section 9(c)(1)(B).

75. Fur Workers' Union No. 72 v. Fur Workers' Union No. 21238, 105 F. 2d 1 (C. C. A. D. C. 1939), *aff'd. per curiam*, 308 U. S. 522 (1938); see also United States v. Hutcheson, 312 U. S. 219 (1941) (alleged anti-trust violations).

76. *Compare* Mays Furs v. Bauer, 282 N. Y. 331, 26 N. E. 2d 279, *rehearing denied*, 282 N. Y. 804, 27 N. E. 2d 210 (1940) *with* United Brewing Co. v. Beck, 200 Wash. 474, 93 P. 2d 772 (1939).

generally by one group of workers with the economic advantages the other has obtained from the employer and the feeling that better terms can be obtained by the second union.[77] Cardozo justified rival-union picketing in *Nann v. Raimist*[78] where the recognized union worked under conditions and for wages which were lower and might tend to depress the standards which the members of the rival union had achieved. In absence of an administrative determination of the proper bargaining representative the Act very wisely does nothing to impede "primary" strike action by the unrecognized union.[79] The employer and the recognized union have a forum in which their grievances can be aired. No reason is seen to protect the recognized union or the employer when the machinery to obtain certification is available.

Strike action (or inducements to strike) to compel an employer to assign particular work to one group of employees or craft rather than another also constitutes an unfair labor practice.[80] Such strikes have most frequently been called by craft unions within the American Federation of Labor. The long standing dispute between the Brewery Workers' Union and the Teamsters over the right to represent brewery drivers is the classic example.[81] The attempts of the A. F. L. to settle such disputes have often been unsuccessful.[82] Although ideally such disputes should be left to the democratic processes of the Federation itself,[83] the marked failure of private solution justifies remedial legislative action. The N. L. R. B. is properly the administrative forum to hear and determine these disputes. But the Board in the past has refused to assume jurisdiction where the competing unions were both chartered by the same parent organization.[84] Where, however, the parent organization expelled one of the competing unions for refusing to abide by its decision, the Board issued a certification order.[85] Yet despite such a certification order one district court has found the Norris-La Guardia Act a bar to an injunction against a strike by the non-certified union.[86] On the other hand, another district court took it upon itself to conduct a representation election.[87]

The Taft-Hartley Act attempts to order this chaos by "empowering and directing" the Board to determine all "work-jurisdiction" strikes upon the filing of a charge that such a strike exists unless, within ten days after notice that the charge has been filed, the parties settle the dispute privately.[88]

Jurisdictional disputes have been a plague on collective bargaining; but they have had their function. Certainly strikes against recognition

77. See PETERSEN, STRIKES IN THE UNITED STATES 1880-1936 (1937).
78. 255 N. Y. 307, 174 N. E. 690 (1931).
79. See Jaffe, *Inter-Union Disputes in Search of a Forum*, 49 YALE L. J. 424, 459 (1940). The philosophy of a "hands off" policy is well expressed in Stillwell Theatre v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932).
80. Section 8(b) (4) (D).
81. See Jaffe, *supra* note 79 at 438-443.
82. *Ibid.*
83. PETERSEN, AMERICAN LABOR UNIONS. c. XIII (1945); see also Chaffee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1027-1028 (1930).
84. Axton-Fisher Tobacco Co., 1 N. L. R. B. 604 (1936).
85. Jacob Schmidt Brewing Co., 57 N. L. R. B. 548 (1944).
86. Yoerg Brewing Co. v. Brennan, 59 F. Supp. 625 (D. Minn. 1945).
87. International Brotherhood of Teamsters v. International Union of Brewery, etc., Workers, 25 F. Supp. 870 (S. D. Cal. 1938), *rev'd.*, 106 F. 2d 871 (C. C. A. 9th 1939).
88. Section 10(k).

of a company-dominated union have had their place; even the Wagner Act had not completely obviated their necessity.[89] Where a union ceases to perform its function and the leaders forget their duty to attempt betterment of the working conditions of the rank-and-file, strike action by a rival union, if no forum is available, appears justified.[90] Today, however, the forum (the N. L. R. B.) *is* available. Compulsory arbitration of labor disputes has not been considered desirable where *bargaining* issues are involved, but the Taft-Hartley Act wisely recognizes that it is the only way of settling *jurisdictional* disputes.[91] Through the administrative tribunal, long advocated by even the leaders of the labor movement as the proper agency for solving these jurisdictional problems,[92] it is to be hoped that the ideal of collective bargaining will be furthered and the economic waste caused by work-jurisdiction disputes will be ended.[93]

The analysis already made of the constitutionality of restrictions against picketing designed to induce strikes is as applicable where the dispute is of a jurisdictional nature as elsewhere.[94]

Sanctions: Thus far "secondary boycotts," strikes to induce employers to join a particular association, and jurisdictional strikes have been referred to only as "unfair labor practices." [95] The sanction of the cease and desist order, however, enforceable upon review by a circuit court order,[96] is not the only sanction against labor organizations for engaging in such practices. More direct remedies to injured parties are available.

The federal injunction, which was effectively removed from the employer's arsenal of weapons by the Norris-La Guardia Act, has been returned, but in a much less deadly form than that of which Judge Amidon complained in his famous opinion.[97] Attacks upon the injunction were directed largely at the procedural ease with which it was possible for employers to restrain the concerted activities of their employees.[98] The Taft-Hartley Act restores equity jurisdiction to the federal district courts to grant "such temporary relief or restraining orders as it deems just and proper" at the instance—not of a private party—but of the N. L. R. B. after it has issued a complaint.[99] The Board will seek such injunctive relief, it is assumed, only where it is reasonably convinced that greater harm will result from failure to petition the court than from hearing all the issues in due course. Fully aware of the abuses latent in the power of the equity injunction, the Board no doubt will be very cautious in the exercise of its discretion. The power, however, to petition for equitable

89. As late as 1944 charges of "company domination" were made in 187 cases before the Board (7.3% of the total); disestablishment orders resulted in 101 of the cases. 9 NLRB ANN. REP. 79, 83 (1944).

90. *See* Stilwell Theatre v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); Nann v. Raimist, 255 N. Y. 303, 174 N. E. 690 (1931).

91. See Frey, *supra* note 54 at 271-275.

92. See BROOKS, *op. cit. supra,* note 65 at 167; see Jaffe, *supra* note 79 at 456 *et seq.*

93. In 1945 rival-union strikes were responsible for only 2.2% of the total man days of idleness as a result of labor disputes; "work-jurisdiction" strikes were responsible for 2.7% of the total. DEP'T. LABOR BULL. 878 at 27 (1945). In the last prewar year, 1940, rival-union strikes were responsible for 4.1% of the total man days idle through labor disputes; "work-jurisdiction" strikes, for 2.2%. DEP'T. LABOR BULL. Ser. No. 1282 at 24 (1940).

94. See discussion at 89 *supra.*

95. See Section 8(b) (4) (A), (B), (C) and (D), which classifies the activities as "unfair labor practices."

96. Section 10(c) and 10(e).

97. *See* Great Northern Ry. v. Brosseau, 286 Fed. 414 (D. N. D. 1923).

98. See FRANKFURTER AND GREENE, *op. cit. supra,* note 1, at c. II, V.

99. Section 10(j).

relief is not left completely to the discretion of the Board. It need not seek a restraining order even where a *complaint* is lodged against an employer,[100] but upon the mere filing of a charge by any person accusing a labor union of engaging in a "secondary boycott" strike to compel an employer to join a particular association, or rival-union strike, the "officer or regional attorney to whom the matter may be referred . . . [having] . . . reasonable cause to believe such charge is true and that a complaint should issue . . . *shall*, on behalf of the Board, petition any district court . . . for appropriate injunctive relief pending the final adjudication of the Board . . . ;" by the mere allegation of "substantial and irreparable" injury to the charging party a five day temporary order may issue without notice.[101] The need for such expeditious treatment is not apparent. Why such injunction need be *mandatory* upon a mere finding of "reasonable cause" by one individual, the regional attorney, is equally difficult to understand. It is submitted that a return to labor law by injunction—albeit in diluted form—is unwise. A court of equity is not equipped to determine, in a field as complex as labor relations, when an injunction is "just and proper." [102] Only after administrative determination does a temporary restraining order by the circuit court, pending full review, seem proper.[103] If it is felt that the administrative process is too slow it could easily have been provided that all the activities now subject to a mandatory injunction be given priority of hearing by the Board, just as the Act provides in the case of a "work-jurisdiction" dispute.[104]

Use by a labor organization of those economic weapons which are subject to a cease and desist order and mandatory injunction provides also a cause of action for damages.[105] Since the *Coronado* case [106] labor unions have been proper parties to sue or be sued as entities in federal court.[107] Doctrinaire impediments prevented many of the states, in absence of legislation, from achieving the same result.[108] Apparently diversity of citizenship will be necessary to recover in federal court, although the amount in controversy will not be relevant.[109] Any state court willing to take jurisdiction of the parties may determine the cause.[110]

The Act grants this right of action to "whoever shall be injured in his business or property by reason of" the use of the proscribed economic

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100. "The Board shall have power, upon issuance of a complaint . . . to petition any District Court . . . for appropriate temporary relief or restraining order." Section 10(j).

101. Section 10(1) (italics supplied).

102. See, generally, FRANKFURTER AND GREENE, *op. cit. supra*, note 1; see also FREY, THE LABOR INJUNCTION: AN EXPOSITION OF GOVERNMENT BY JUDICIAL CONSCIENCE AND ITS MENACE (1922).

103. Section 10(e) gives the Board such power.

104. Section 10(k).

105. Section 303. See Senate debates on the desirability of the mandatory injunction in 93 CONG. REC. 5060, 5061, 5062 (May 9, 1947). Note that § 8(b) makes it an unfair labor practice for a "labor organization or its agents" to engage in any of the proscribed activities. Section 303 makes it "unlawful" only for "any labor organization" to engage in those activities.

106. United Mine Workers v. Coronado Coal Co., 259 U. S. 344 (1922).

107. Section 301(b) provides: "Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States."

108. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COL. L. REV. 809, 813 (1935); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383, 404 (1924).

109. Section 303(b); *cf.* 301(a) which removes necessity for diversity of citizenship in breach of contract cases.

110. Section 303(b).

weapons.[111] The language is capable of very broad construction, giving a right of action to those only remotely involved. More likely, however, judicial construction of the legal concepts "business" and "property" and the employment of a "proximate cause" doctrine will allow only those within a "reasonably foreseeable" area of possible injury to recover.

Since the damages remedy is adequate to make whole all those injured by a labor organization's "unlawful" strike, use of the injunction remedy before full and complete determination of the issues seems even less understandable.

The dual jurisdiction over the same subject matter presents a novel problem in the field of federal labor law. Conceivably the Board may make a finding of fact which will lead to the issuance of a cease and desist order against a labor organization. A jury, on the other hand, may find the same evidence insufficient to sustain a cause of action for damages. The formal rules of evidence now apply in Board proceedings as well as in court.[112] The judge's charge theoretically should contain the same "law" as will guide the Board in its fact determination. Since the parties in the two proceedings are not technically the same, however, neither finding will be res judicata as to the other.[113] It is not unlikely that a greater number of issues will be held "matters of law" in order to obtain more uniform findings.

Employees who engage in "illegal" strikes subject themselves to a fourth type of sanction not expressly provided for in the Act. Although under the Wagner Act the privilege "to engage in concerted activities" was "guaranteed," [114] and workers on strike maintained their "employee" status,[115] where the strike engaged in was found to be "unlawful" the employer by judicial and administrative decision became privileged to discharge the strikers. Thus an employer who discharged workers who were on strike to compel bargaining with a minority union in violation of a certification order, was found innocent of any unfair labor practice.[116] Employees striking in violation of their collective bargaining contract may properly be discharged,[117] as may employees who by striking seek to compel an employer to violate a federal statute.[118] It would seem safe to predict that an employer will be privileged to discharge employees who engage in strike action proscribed by the Taft-Hartley Act, whether the strikes be caused by an employer unfair labor practice or are designed to secure economic concessions. The privilege to discharge those who strike "unlawfully" may not be used, however, as a device to discriminate against those most active in union affairs if the employer is successfully to avoid a Board order to reinstate.[119] The employer must prepare also to answer the possible argument that since the Act provides specific remedies for

111. *Ibid.*

112. Section 10(b). See Note, *The Taft-Hartley Act—An Administrative Chimera,* 96 U. OF PA. L. REV. 67, 77 (1947).

113. In Board proceedings the Board itself is complainant; in a suit for damages the party plaintiff will be the injured party. On the problem of "res judicata" see Davis, *Res Judicata in Administrative Law,* 25 TEX. L. REV. 199 (1947).

114. See § 8(1) of the Wagner Act.

115. Section 2(3) of the Wagner Act.

116. Thompson Products, Inc., 72 N. L. R. B. 150 (1947).

117. N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332 (1939); see Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining,* 50 HARV. L. REV. 1071, 1112-1113 (1937) on the "illegality" of striking in breach of contract.

118. American News Co., 55 N. L. R. B. 1302 (1944).

119. *See* N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 346 (1938).

those injured by those strikes which it makes "unlawful," further sanction is beyond the "Congressional intent."

Time as a Factor in Determining Strike Legality: "Cooling-off periods" have previously been the subject of federal legislation. The Railway Labor Act[120] was the first Congressional attempt to stave off "hasty" resort to economic warfare; the Smith-Connally Act[121] was a more recent attempt. The Taft-Hartley Act codifies, as a part of our national labor policy, Congressional disdain for hasty strike action. Just as the Wagner Act made it an unfair labor practice for an employer to refuse to bargain collectively,[122] so a refusal by a certified union to bargain collectively now constitutes an unfair labor practice.[123] Section 8 (d) in defining the duty to bargain collectively imposes, *inter alia,* a duty on labor organizations under contract with an employer to give the latter sixty days' notice of a proposed modification or termination of a collective bargaining agreement.[124] Any strike called within the sixty day period or prior to the expiration date of the contract (whichever is later) constitutes a breach of the duty to bargain collectively—an unfair labor practice.[125] Any employee who participates in such a strike loses his "employee" status and with it the power to vote in certification elections and protection from what otherwise might be unfair labor practices on the part of his employer.[126]

The practical effect of the notice requirement is negligible. It will probably become standard procedure for all labor unions to notify the employer of their intention to terminate their contracts sixty days prior to the expiration date. Authorized strikes prior to that date will, of course, subject the unions to an action for damages in breach of contract if the contracts contain a no-strike clause.[127] Where no expiration date exists notice of termination will be given as soon as new negotiations are undertaken. A hardship may arise in the latter situation. If an impasse is reached strike (and lockout) [128] action will have to be postponed but the employer is free to transfer orders for which he has contracted to other employers (whose employees may not lawfully strike in sympathy), and he is free to procure replacements in readiness for "S-day." The union's ability to implement strike funds for what now may be a longer strike is decidedly limited. Effective strike action likewise requires that workers be keyed to a certain psychological pitch.[129] Maintenance of that pitch for sixty days after responsible leaders have determined that a strike is necessary will indeed be difficult. Where no expiration date has been agreed to in the original "bargain," Congress should not superimpose its judgment on that of the parties to the "bargain." Of course, where a "public utility" is involved the problem requires different treatment and

120. 44 STAT. 587 (1926), 45 U. S. C. § 151 (1940).
121. 57 STAT. 163 (1943), 50 U. S. C. § 1501 (Supp. 1943).
122. Section 8(5) of the Wagner Act; Section 8(a) (5) of the Taft-Hartley Act.
123. Section 8(b) (3).
124. Section 8(d) (1).
125. Section 8(d) (4) and § 8(b) (3).
126. "Any employee who engages in a strike within the sixty-day period specified . . . shall lose his status as an employee of the employer engaged in the particular labor dispute for the purposes of sections 8, 9 and 10 of this Act. . . ." Section 8(d).
127. Section 301(a).
128. The employer's duty to bargain collectively includes the duty not to "lockout" during the "cooling-off" period. Section 8(d) (4).
129. Pressman, *Freedom and Reaction: Some Observations on the Current Anti-Labor Drive,* 14 U. OF CHI. L. REV. 370, 379 (1947).

analysis from that in which free collective bargaining appears to be the ideal.[130]

Some Aspects of "Lawful" Strikes

The Act preserves the status of "employee" for those workers who engage in strike action until formally discharged.[131] Employees discharged for taking part in strikes caused by employer unfair labor practices are entitled to reinstatement.[132] Where, however, the strike is not provoked by an unfair labor practice but is used as a bargaining weapon to compel economic concessions, non-discriminatory replacement of the strikers is a privileged step which the employer may take.[133] Upon termination of such an "economic" strike the employer is under no duty to discharge the replacements and rehire the strikers.[134] The *Sartorius* doctrine[135] originally permitted only the strikers to vote in certification elections regardless of whether the strike was of the "unfair labor practice" variety or "economic." The *Wurlitzer* case[136] modified the doctrine and both the replacements and strikers were permitted to vote where the strike was not provoked by the employer's unfair practice. As has already been pointed out, the Taft-Hartley Act now permits only the replacements to vote, completely reversing the Board's earliest position.[137] If the Board is reasonably convinced that the replacements are intended to be only temporary and that upon termination of the strike most of the strikers will be rehired, an election ought not to be ordered. Industrial stability and collective bargaining will not be furthered if labor is to be represented by representatives not of their own choosing. But if the Board does follow a policy of holding such election during an economic strike the prohibition against repeat elections for a twelve-month period[138] should be modified.

"Wildcat" Responsibility of Labor Organizations

No provision of the Taft-Hartley Act is more unique than that which makes a labor organization "bound by the acts of its agents"[139] and which, in subsequently defining "agent," provides that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[140] There arises, then, the question of labor union liability in breach of contract for work stoppages which are "unauthorized" and "unratified" where the contract contains a "no-strike" clause. Most state legislation specifically provides for immunity from liability under such circumstances.[141] Section 6 of the Norris-La Guardia

130. The concept of the "public utility" and the "government employee" in labor law is developed sufficiently to warrant treatment and analysis outside this note. See Title II of the Taft-Hartley Act.

131. Section 2(3). Formal discharge is necessary to end the "employee" status. Stewart Die Casting Corp. v. N. L. R. B., 114 F. 2d 849 (C. C. A. 7th 1940), *cert. denied*, 312 U. S. 680 (1941).

132. Kellburn Mfg. Co., 45 N. L. R. B, 322 (1942).

133. N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333 (1938).

134. *Id.* at 345.

135. Matter of A. Sartorius & Co., 10 N. L. R. B. 493 (1938).

136. Matter of Rudolph Wurlitzer, 32 N. L. R. B. 163 (1941).

137. Section 9(c)(3). See discussion at 93 *supra.*

138. Section 9(c)(3).

139. Section 301(b).

140. Section 301(e).

141. See, *e. g.*, 2A CCH Lab. Law Serv. ¶ 43,405 (Conn. 1939); 2A CCH Lab. Law Serv. ¶ 43,602 (Mass. 1935); 2A CCH Lab. Law Serv. ¶ 43,410 (Pa. 1940).

Act had granted similar immunity to both employers and labor organizations.[142] Prior to the passage of that Act union officers were held vicariously liable for the "unlawful" actions of strikers despite repudiation of those acts by the leadership.[143] Apparently in that case only discipline or expulsion of the strikers would have exonerated the leadership. Frankfurter and Greene in advocating liability only for "authorized" acts pointed out that repudiation, disavowment, and importunement to strikers to act lawfully were insufficient to relieve the leadership of liability.[144] But the requirement in the Norris-La Guardia Act that "authorization" be found before vicarious liability would be imposed was recently construed so strictly by the Supreme Court that Justice Frankfurter felt it necessary to dissent.[145] The decision in the *Carpenters and Joiners* case is largely responsible for the broad definition of "agent" contained in the Taft-Hartley Act.[146]

To avoid vicarious liability for "unauthorized" work stoppages unions have been negotiating for clauses in their bargaining contracts in which the employer agrees not to sue the union for damages arising from such stoppages. Some labor unions have succeeded in gaining complete "wildcat" immunity;[147] others have been granted such immunity only in consideration of the union's agreement to do all reasonably within its power to terminate the stoppages.[148] Unique is the contract obtained by the United Mine Workers, which omits the traditional "no-strike clause" and which "binds" the union only during such times as the workers are "able and willing to work."[149]

If the "wildcat responsibility" provision leads to contracts such as that covering the mine workers it will achieve anything but responsibility on the part of labor unions. A more reasonable provision of the Act would impose liability on labor unions for work stoppages in violation of contract only where authorized, ratified, or where the union leadership has turned its back on a stoppage which it has the power to terminate. In absence of remedial legislation those contracts which have struck a real bargain—a union agreement to help end "wildcat" strikes in exchange for immunity from suit—appear most conducive to harmonious industrial relations.

An Estimate of the Situation

Labor Department statistics show that the consumer price index in food has risen 91.1% from March 15, 1941 to March 15, 1947.[150] Wages

142. "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful act of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such act, or ratification of such acts after actual knowledge thereof." Section 6 of the Norris-La Guardia Act.

143. *E. g.*, Alaska S. S. Co. v. International Longshoremen's Ass'n., 236 Fed. 964 (W. D. Wash. 1916).

144. Frankfurter and Greene, *op. cit. supra,* note 1, at 74-75.

145. United Brotherhood of Carpenters & Joiners v. United States, 330 U. S. 395, 413 (1947).

146. See 93 Cong. Rec. 6608 (June 5, 1947).

147. 20 Lab. Rel. Rep. (Labor-Management) 287 (1947).

148. *Ibid.*

149. 20 Lab. Rel. Rep. (Labor-Management) 165 (1947).

150. Dep't. Labor, Consumers' Price Index for Moderate-Income Families in Large Cities (1947).

were the major issue in all strikes during that period.[151] From V-J Day to June 30, 1946, disputes over wage increases alone were responsible for 80.3% of the total man-days idle in stoppages involving 1,000 or more workers.[152] Yet the net spendable weekly earnings of workers without dependents in manufacturing industries during the period from 1941 to March 1947 rose from $28.05 to only $40.89.[153] Total labor union membership at the end of 1946 was less than fifteen million.[154] Despite these figures which show the inability of wages to keep pace with prices, and the past inability of labor to organize more of the American workers, Congress has deemed it wise to impair the ability of workers to organize and to use their most effective economic weapons to gain economic concessions after having achieved organization. Industrial stability is a goal to strive for. But even if legislative mandate could create stability, stability would not solve our underlying economic problems. Strikes, picketing and boycotts are harmful, certainly. The answer, however, is not to be found in the impairment of the effectiveness of these weapons, but rather in a thorough investigation of the *causes* for industrial conflict. Collective bargaining must be given a chance to work. Bargaining and contract keynote the relationship between businessmen; so they must keynote the relationship between labor and management. Our endeavor should be directed towards providing labor and management with all the tools necessary to "strike a bargain." Trained negotiators are needed on both sides of the fence; statistics are needed; facilities and personnel for voluntary arbitration are needed.[155] Limitations on the exercise of bargaining power by bold, broad restrictions on the right to strike are a step in the wrong direction.

B. W.

Union Security Devices and the Taft-Hartley Act

Introduction

The social and economic implications of the closed shop and similar union security devices have been a source of industrial controversy in the United States since before the Revolutionary War.[1] Inevitably the conflict in the industrial arena has been reflected in the activities of courts and legislatures. The most important recent development in the history of union security is the Taft-Hartley Act. It is the purpose of this note to evaluate the Act in the light of the reasons for the demand for union security, the objections to various devices used to achieve it, and the history of earlier governmental regulation.

Nature of Devices

Union security is generally thought of as an intermediate objective of organized labor, a strengthened bargaining position needed to secure

151. Dep't. Labor Bull. No. 711 at 18 (1941); Dep't. Labor Bull. No. 741 at 15 (1942); Dep't. Labor Bull. No. 782 at 18 (1943); Dep't. Labor Bull. No. 878 at 27 (1945); Dep't. Labor Release, Nov. 20, 1946; Dep't. Labor Release, July 15, 1947.

152. Dep't. Labor Release, Nov. 20, 1946.

153. Dep't. Labor Release, Hours and Earnings 11 (Sept. 5, 1947).

154. At the end of 1946 the total labor union membership was 14,974,000; in 1935, the year of the Wagner Act, the total was 3,728,000. Dep't. Labor Release, Membership of Labor Unions in the United States 1897-1946 (1947).

155. See Frey, *supra* note 54, at 277-280 (1947).

1. Toner, The Closed Shop 6 (1944).

economic concessions.[2] Probably the most important methods of achieving this position are through devices involving compulsion of employees exerted through the employer—the closed shop (and variations on it) and the compulsory checkoff of dues.

The closed shop makes membership in the union a condition of employment for all members of the bargaining unit at all times. The variations from this norm may afford initial periods of exemption for new employees (union shop) or provide only for preference to be given to union men in hiring (preferential shop). Maintenance of membership contracts, which became important during the War as a result of the policy of the War Labor Board,[3] provide that after a certain "escape period" all employees who are then members of the union must remain so.[4] Contract provisions relating to requirements for admission to the union are significant in determining the effect of the foregoing relationships on the employer's discretion in hiring. If the union must accept all qualified workmen, for instance, a closed shop does not prevent the employer from hiring anyone who does not have strenuous objections to joining a union.

The compulsory checkoff of dues often accompanies the closed shop. Where the checkoff alone is in effect, it usually applies only to union members, but some contracts require a checkoff covering all employees—an arrangement which gives to a union the same *financial* support as a closed shop.[5]

Reasons for the Use of Union Security Devices

Perhaps the most important reason for the long history of the demand for the closed shop or similar relationships[6] was the employer's common law privilege of discriminating against union workers in hiring and firing. This made it possible, in the absence of a closed shop, to break a union in any period of plentiful labor by replacing its members.[7] Legislation forbidding such discrimination,[8] however, has not changed the attitude of organized labor toward restrictions on their power to secure the

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2. See Holmes, C. J., dissenting in Plant v. Woods, 176 Mass. 492, 505, 57 N. E. 1011, 1016 (1900).

3. For a study of the development and enforcement of this compromise formula, see Jaffe, *Union Security: A Study of the Emergence of Law,* 91 U. of Pa. L. Rev. 275 (1942).

4. As of April, 1946, 77% of the organized workers in this country were covered by collective agreements involving some requirement of membership in a union as a condition of employment:

Closed Shop	30%
Union Shop	15%
Maintenance of Membership	29%
Preferential Hiring	3%
	77%

Hearings before Committee on Labor and Public Welfare on S. 55 & S. J. Res. 22, 80th Cong., 1st Sess. 67 (1947).

5. This device has recently become important in Canada. See Spector, *The Rand Formula: A Milestone in Trade Union Security,* 6 Rev. du B. 458 (1946).

6. Millis and Montgomery, Organized Labor 470-71 (1945).

7. Even when it was not economically feasible to replace all members of the union, the potential ability to do so, along with interim discrimination in advancement to better jobs, was naturally a serious deterrent to union membership. See W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 387, 116 N. E. 801, 803 (1917).

8. § 8 of the Wagner Act, 49 Stat. 452 (1935), 29 U. S. C. § 158 (1940), applied to industries "affecting interstate commerce." Many states have passed similar legislation covering intrastate industry.

closed shop.[9] Bargaining power is still dependent on the number of potential strikers and the union's financial resources.[10] Union members tend to resent the presence in a plant of "free riders" who enjoy the benefits of unionization without sharing its burdens. The closed shop, coupled with the power to limit admissions, provides a defense against labor spies and rival unionists,[11] and is helpful in maintaining the discipline necessary for the fulfillment of contract obligations.[12]

Sometimes the demand for the closed shop is related to the desire for *job* security as well as *union* security. An exclusive membership policy in conjunction with a closed shop is regarded as a device for mitigating the hardships of an oversupply of labor in a particular industry. Except in time of depression, however, such practices are unusual because of long run difficulties in restricting the labor supply,[13] and the feeling of most labor leaders that they tend to retard the spread of unionization.[14]

Objections to Union Security Devices

Much of the opposition to various devices undoubtedly comes from employer sources,[15] and is essentially an attack on unionism itself.[16] Some of the objections of employers, however, require careful consideration, as do certain aspects of union security which have aroused antagonism among non-union workers, new unions, and the public at large.

The Employer: Although some employers prefer the closed shop relationship for the sake of avoiding jurisdictional conflict and developing union responsibility, most of them seem to feel that an essential management prerogative is destroyed or limited by any union control over hiring, and that union discipline is purchased at the expense of plant discipline.[17] It is not altogether clear, however, that the total effect of the closed shop is detrimental to production.

It is true that union work rules are more easily imposed on a closed shop, and that they may lessen individual productivity.[18] But aside from the fact that without such rules, workers may be subject to a highly detrimental "speedup," there are offsetting considerations. Control over hiring gives a union less incentive for demanding firing control through elaborate and sometimes inefficient seniority provisions.[19] Furthermore, the stability which comes with union security tends to substitute coopera-

9. The attitude of labor is made clear by the testimony of union leaders at the *Hearings before Committee on Labor and Public Welfare on S. 55 & S. J. Res. 22,* 80th Cong., 1st Sess. 425, 996, 1065, 1180, 1224, 1306, 1332, 1354, 1373, 1580 (1947).

10. The problem of maintaining sufficient membership is especially important in newly organized industries since workers without a background of unionism tend to become disinterested after temporary gains have been won. Millis and Montgomery, Organized Labor 479 (1945).

11. See Mr. Justice Jackson, dissenting in Wallace Corp. v. N. L. R. B., 323 U. S. 248, 268 (1944).

12. A union may use its power of procuring discharge to repress wildcat strikes. See Snay v. Lovely, 276 Mass. 159, 176 N. E. 791 (1931).

13. Any attempt to restrict labor supply over a long period is likely to result in competition from related industries and hasten technological changes.

14. Slichter, Union Policies and Industrial Management 64 *et seq.* (1941).

15. Twentieth Century Fund, Trends in Collective Bargaining 41 (1945).

16. Millis and Montgomery, Organized Labor 481 (1945).

17. National Industrial Conference Report, 4 Lab. Rel. Ref. Man. 1005 (1939).

18. Millis and Montgomery, Organized Labor 482 (1945).

19. Slichter, Union Policies and Industrial Management 53, 98 (1941).

tive for militant union leadership,[20] making possible union assistance in seeking better production methods.[21]

The Non-Union Employee: The pressure of closed or union shops on non-union employees depends chiefly on the admission policies of the union concerned. When an individual secures a job, he inevitably accepts a great many conditions of employment over which he individually has little control: wages, hours, physical plant, and a particular group of co-workers. It does not ordinarily seem much of a hardship on him to have to accept the further condition of union membership if it is available.[22] Indeed, only by becoming a voting member of the union which represents his bargaining unit can he have even much indirect influence on his industrial environment. If, however, he cannot on reasonable terms secure the membership which is a condition of his getting the job, then he is being seriously harmed.

Rival Unionism: Unlimited power in the hands of a union to procure discharge may be a powerful weapon against a justified change of allegiance by the membership or the deposing of improper union leadership. But the basic problem of internal union democracy seems to require direct regulation rather than an attack on a device which has essentially only an aggravating effect where unfair political tactics are being employed.

The Public: The interest of the public in efficient production may be even greater than that of the employer, since sufficiently extensive unionism tends to make any inefficiency fairly uniform, and consequently the increased cost is passed on to the consumer. The discussion of production from the point of view of the employer remains pertinent here. More particularly, restrictions on total labor supply in an industry result in higher prices.

Legal Aspects of Union Security Devices Before the Taft-Hartley Act

The Courts: Before the 1930's, there does not seem to have been much legislation dealing with union security. In the courts the problems raised by the closed shop have been handled in various fashions, depending on time and place, with the trend generally toward acceptance of the closed shop as justified by the self-interest of organized labor.

In analyzing judicial reaction to the closed shop it is necessary to consider how the cases have reached the courts—it is seldom entirely accurate, or even meaningful, to speak of the closed shop as being "legal" or "illegal."

One of the most important aspects of litigation involving the closed shop has been the effect of this objective on the ability of a union to strike or picket without being subject to injunction. Injunctions have been granted on the complaint of employers,[23] non-union employees,[24] and rival

20. Millis and Montgomery, Organized Labor 248 (1945).

21. Slichter, Union Policies and Industrial Management 7 (1941).

22. Aside from a general anti-union attitude, the chief reasons for refusal to join a union are probably loyalty to the employer, fear of employer recrimination, the hope of currying favor, unwillingness to pay dues, and general apathy.

23. Keith Theatre v. Vachon, 134 Maine 392, 187 Atl. 692 (1936); Sarros v. Nouris, 15 Del. Ch. 391, 138 Atl. 607 (1927). Injunction denied in F. F. East Co. v. United Oystermen's Union No. 19600, 130 N. J. Eq. 292, 21 A. 2d 799 (Ct. Err. & App. 1941); Scofes v. Helmar, 205 Ind. 596, 187 N. E. 662 (1933).

24. Dorrington v. Manning, 135 Pa. Super. 194, 4 A. 2d 886 (1939). Injunction denied in Kemp v. Division No. 241, 255 Ill. 213, 99 N. E. 389 (1912).

unions,[25] and have banned picketing,[26] striking,[27] and "threatening" to strike.[28] Another type of closed shop controversy in the courts has involved damage claims by individual workers against unions or their leaders for loss of employment.[29] The propriety of the closed shop relationship has also been considered in suits for enforcement of closed shop contracts,[30] attempts to have them declared invalid,[31] and judicial review of admissions and expulsions by unions.[32]

The development of a philosophy appropriate for the solution of problems raised by the closed shop has been hampered by a failure to analyze carefully the factual nature of this complex and controversial relationship. Instead a considerable emphasis has been placed on the mental pictures conjured up by terms like "compulsion," "justifiability," and "monopoly."

One distinction sometimes drawn by courts was between a closed shop contract "freely entered into" and an effort to compel an employer to accept the closed shop relationship through economic pressure. A court might enjoin a strike the purpose of which was to secure a closed shop contract, but refuse to interfere with a strike for enforcement of a closed shop contract previously entered into.[33] Such an approach, of course, ignored the fact that any collective bargaining agreement must have been the product of conflicting economic pressures.

Courts have been affected by two forms of the "purpose" concept in viewing particular closed shop situations. One form involved the difference between the purpose of securing more work for union members and that of forcing other employees to join, the former being regarded as more legitimate. This difference, however, is purely one of terminology for an open union,[34] and the Massachusetts court, at least, eventually

25. Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900). Injunction denied in Hoban v. Dempsey, 217 Mass. 166, 104 N. E. 717 (1914).

26. Keith Theatre v. Vachon, 134 Maine 392, 187 Atl. 692 (1936). See Note, 96 U. OF PA. L. REV. 85 (1947).

27. W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801 (1917).

28. Dorrington v. Manning, 135 Pa. Super. 194, 4 A. 2d 886 (1939).

29. Sutton v. Workmeister, 164 Ill. App. 105 (3d Dist. 1911); Berry v. Donovan, 188 Mass. 353, 74 N. E. 603 (1905), *appeal dismissed,* 199 U. S. 612 (1905).

30. Usually these take the form of actions for specific performance against the employer as in Corpuz v. Hotel and Restaurant Employees Local No. 631, 61 Ariz. 483, 151 P. 2d 705 (1944). A money judgment was recovered, however, in Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905). *But cf.* Cohen v. Berkman, 130 Misc. 725, 225 N. Y. Supp. 135 (1927). And an injunction against "interference" with a preferential shop agreement by a rival union was granted in Tracey v. Osborne, 226 Mass. 25, 114 N. E. 959 (1917), while a contractor sought an injunction against employment of non-union men by a subcontractor in Lehigh Co. v. Atlantic S. & R. Works, 92 N. J. Eq. 131, 111 Atl. 376 (Ch. 1920).

31. International Ass'n of Machnists v. State, 153 Fla. 672, 15 So. 2d 485 (1943) (Quo warranto by the attorney general).

32. Local Union No. 65 of Amalgamated S. M. W. I. A. v. Nalty, 7 F. 2d 100 (C. C. A. 6th 1925) (Damages for refusal of local to accept transfer from affiliated local as required by constitution of Amalgamated); Sweetman v. Barrows, 263 Mass. 349, 161 N. E. 272 (1928) (Damages for wrongful expulsion); Brennan v. United Hatters, 73 N. J. L. 729, 65 Atl. 165 (Ct. Err. & App. 1906) (Damages for improper suspension); Betts v. Easley, 161 Kan. 459, 169 P. 2d 831 (1946) (Injunction against denial of membership); James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329 (1944) (Injunction against continuing simultaneous exclusion from full membership rights and closed shop).

33. *See* Stearns Lumber Co. v. Howlett, 260 Mass. 45, 60-61, 157 N. E. 82, 87 (1927) and cases cited there.

34. If the union is willing to accept new members the only way the closed shop results in more work for its members is by requiring the holders of various jobs to become union members. "More work for union members" in this sense is simply another way of saying "more union members."

recoiled from an interpretation which would favor closed unions, leaving the concept a pure makeweight for decisions reached on other grounds.[35] The other manifestation of a "purpose" approach has been on the basis of "malice" as opposed to self-interest. Since genuine ill-will was not required for malice, the use of this distinction served only to conceal behind semi-factual terminology the inconsistency of decisions based on differing judicial attitudes toward the economic self-interest of unions.[36]

Closely related to the "purpose" approach was the "justifiability" test. Here again the personal attitude of the judge toward the desirability of unionism in general was likely to be more significant than the facts of a particular case.[37] One court, however, seems to have been sufficiently impressed with the factual nature of justification to have left the question to a jury.[38]

The idea that the extensiveness of a closed shop relationship should be taken into consideration has retained in recent years a greater degree of acceptance than any of the foregoing conceptions.[39] This approach has the advantage of creating some correlation between the effect of the closed shop on non-union men and its treatment in the courts. Nevertheless, the drawing of a line where "monopoly" begins is bound to involve difficulties, and there has been a growing tendency to recognize that extensiveness is often a necessary attribute of any form of secure unionism.[40]

The most useful development in the judicial attitude toward closed shops has been the growing awareness that a union involved in such a

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35. Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906) involved a strike by bricklayers to procure "pointing" work for members of the union as opposed to regular "pointers" who did not have the skills necessary for admittance to the union. The court held the union activity privileged as a legitimate effort to secure more work for its members. In W. A. Snow Iron Works v. Chadwick, 227 Mass. 382, 116 N. E. 801 (1917) the finding of a master in chancery that the "paramount motive" of the strikers was to compel others to join the union was held sufficient to take the case out of the doctrine of *Pickett v. Walsh.* When in a later case, however, a plaintiff objected that the union's activities were beyond the protection of *Pickett v. Walsh* because the union was seeking to enlist new members, the court said that the union with a closed shop "would open itself to serious criticism" by a policy of exclusiveness, and relying on the master's finding of fact that the "primary purpose" was economic betterment of union members refused an injunction or damages. Shinsky v. O'Neil, 232 Mass. 99, 104, 121 N. E. 790, 792 (1919).

36. Compare the differing interpretations of the motivation of the same union made by the majority of four and the minority of three judges in Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902). Accepting the "principle of law" established by *both opinions,* another judge suggested that the "court simply split on the question of fact as to what the true motive was." Lehigh Co. v. Atlantic S. & R. Works, 92 N. J. Eq. 131, 140, 111 Atl. 376, 380 (Ch. 1920).

37. Justifiability, in Plant v. Woods, 176 Mass. 492, 57 N. E. 1011 (1900) was found lacking on the basis of a judicial evaluation of the amount of gain which union members would achieve through a closed shop.

38. Berry v. Donovan, 188 Mass. 353, 74 N. E. 603 (1905), *appeal dismissed,* 199 U. S. 612 (1905) (Damage suit by worker who refused to join union). *But cf.* Connors v. Connolly, 86 Conn. 641, 86 Atl. 600 (1913).

39. *See* Four Plating Co. v. Mako, 122 N. J. Eq. 298, 300, 194 Atl. 53, 55 (Ch. 1937).

40. "Economic organization is not based today on the single shop. Unions believe that wages may be increased, collective bargaining maintained, only if union conditions prevail, not in some single factory, but generally." Exchange Bakery and Restaurant, Inc. v. Rifkin, 245 N. Y. 260, 263, 157 N. E. 130, 132 (1927). See F. F. East Co. v. United Oystermen's Union No. 19600, 130 N. J. Eq. 292, 21 A. 2d 799 (Ct. Err. & App. 1941); Williams v. Quill, 277 N. Y. 1, 12 N. E. 2d 547, 549 (1938), *appeal dismissed,* 303 U. S. 621 (1938).

relationship is sufficiently removed from a fraternal order to merit some external restraint on admissions and expulsions.[41]

National Legislation: The most important national legislation affecting closed shops before the Taft-Hartley Act came in the Norris-LaGuardia Act,[42] the Railway Labor Act as amended in 1934,[43] and the Wagner Act.[44]

The Norris-LaGuardia Act, while not treating of closed shops in particular,[45] in effect made it almost impossible to secure injunctions against strikes and picketing in federal courts, regardless of the object of these activities.[46]

The Railway Labor Act Amendment of 1934 forbade the closed shop in the railroad industry, along with any variations of it whereby membership in a union becomes a condition of employment.[47] This provision was probably suitable for that industry. The history of the unionization of railroads showed that the chief employer opposition was expressed through the use of company dominated unions with closed shop contracts.[48] More important, perhaps, the Brotherhoods had continued to cling to a craft form of unionism in spite of the fact that employees frequently made temporary changes in jobs. Under closed shop conditions these employees would have been forced into dual unionism.[49] It might also be pointed out that ability to achieve a closed shop on the part of the Brotherhoods would have accentuated the unfairness of their discriminatory admissions policies.[50]

The Wagner Act recognized the closed shop by exempting agreements for it from the prohibition against employer discrimination on the basis of union membership.[51] In order for this proviso to be effective, it was necessary that an actual closed shop contract have been made[52] with an

41. While damages for wrongful expulsion are not entirely novel, the right to admission has only recently been given consideration. See note 32 *supra.* For an analysis of the general problem of union exclusiveness, see Summers, *The Right to Join a Union,* 47 COL. L. REV. 33 (1947).

42. 47 STAT. 70 (1932), 29 U. S. C. § 101 (1940).

43. 48 STAT. 1185 (1934), 45 U. S. C. § 151 (1940).

44. 49 STAT. 449 (1935), 29 U. S. C. § 151 (1940).

45. Actually the declaration of public policy could be interpreted as opposed to the closed shop, ". . . he should be free to decline to associate with his fellows. . . ." But if that was the meaning of the section, there was no implementation of it in the rest of the Act, and it does not seem to have been utilized by the courts. A similar declaration in a state anti-injunction statute, however, has been considered by a court in reaching the conclusion that picketing by a union which had not won the support of the employees was not protected by the statute. Roth v. Local Union No. 1460 of Retail Clerks, 216 Ind. 363, 24 N. E. 2d 280 (1939).

46. In Lauf v. Shinner & Co., 303 U. S. 323 (1938) it was held that the strict requirements of the statute as to issuing of injunctions applied even though picketing was for the purpose of compelling an employer to require his employees (none of whom was already a member) to join a union.

47. 48 STAT. 1186 (1934), 45 U. S. C. § 152 (1940).

48. *Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650,* 73d Cong., 1st Sess. 25-28 (1934). MILLIS AND MONTGOMERY, ORGANIZED LABOR 471, n. 2 (1945).

49. TONER, THE CLOSED SHOP 103 (1944).

50. See NORTHRUP, ORGANIZED LABOR AND THE NEGRO, c. 3 (1944).

51. 49 STAT. 452 (1935), 29 U. S. C. § 158(3) (1940).

52. Union pressure and an "informal" agreement were not enough to protect the employer in South Atlantic S. S. Co. v. National Labor Relations Board, 116 F. 2d 480 (C. C. A. 5th 1941), *cert. denied,* 313 U. S. 582 (1941).

independent [53] majority [54] union and that it be not utilized to punish activities on behalf of a rival union [55] if they took place at an "appropriate time." [56] The sanctions directly authorized by the Wagner Act, however, were only against the employer. The limiting of a union's power by penalizing the employer who succumbs to union pressure [57] may in some cases work a real hardship on the employer.[58] Furthermore, the possibility of such a hardship might give an employer a reason, or an excuse, to oppose legitimate union demands or interfere in internal union affairs.[59]

The National Labor Relations Board did achieve some direct control [60] over union admission and expulsion policies through its discretion in the matter of certifying unions as bargaining representatives.[61] While the Board did not regard itself as having sufficient authority to deny certification wherever unions discriminated in their admissions policies, it has taken into consideration whether all members of a bargaining union would be fairly represented.[62] Presumably, then, a union whose policy was to exclude Negroes from jobs would not have been entitled to certification.[63] It should be noted, however, that lack of certification may not be much of a hindrance to a union which is strong enough to compel an employer to bargain with it and which is in no fear of a rival union's activities.[64]

State Legislation: Many states have "baby" Norris-LaGuardia and Wagner Acts providing generally the same effects as the parent versions for state courts and industries not engaged in interstate commerce. In recent years, however, there has been a tendency through the amendment of these acts, passage of new legislation, and constitutional amendments, drastically to limit the power of unions to utilize various forms

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53. The proviso exempts the employer from liability on a closed shop contract only if the union is "not established, maintained, or assisted by any . . . unfair labor practice" and employer domination or assistance is made an unfair labor practice. 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940).

54. 49 STAT. 452 (1935), 29 U. S. C. § 158 (1940).

55. *In re* Cliffs Dow Chemical Co., 64 N. L. R. B. 1419 (1945). See also Wallace Corp. v. National Labor Relations Board, 323 U. S. 248 (1944).

56. A discharge under a closed shop agreement as a result of expulsion for agitation on behalf of a rival union *shortly after the contract had been made* was held privileged by the Board in order to secure for unions a degree of stability during their period of contractual obligation. Matter of Southwestern Portland Cement Co., 65 N. L. R. B. 1 (1945).

57. The employer who discharged an employee because of improper union expulsion would not be permitted to use a closed shop contract as a defense to a charge of "discrimination because of union activity." The resultant unwillingness of the employer to make such discharges naturally imposes a definite limitation on union action.

58. He may be subject not only to a cease and desist order, but also the payment of back pay. Matter of Cape Cod Trawling Corp., 23 N. L. R. B. 208 (1940). Furthermore, a sufficiently irresponsible union leadership might choose to ignore an indirect sanction, forcing the employer to face either a strike or contempt proceedings. *See* National Labor Relations Board v. Gluek Brewing Co., 144 F. 2d 847, 858 (C. C. A. 8th 1944).

59. See Summers, *The Right to Join a Union,* 47 COL. L. REV. 32, 64 (1947).

60. That is, a control not based on sanctions against the employer.

61. 49 STAT. 453 (1935), 29 U. S. C. § 159(c) (1940). ". . . the Board *may* . . . certify to the parties . . . the representatives that have been selected [by the majority of the employees in the bargaining unit]" (emphasis supplied).

62. See Matter of Larus and Brother Company, 62 N. L. R. B. 1075 (1945).

63. If the Negroes already held their jobs, clearly the union would not be acting as the "genuine representative of all employees in the bargaining unit." *See* Matter of Larus and Brother Company, *supra,* note 62 at 1082. As to Negroes seeking to enter the field the Board might find a duty to represent impartially *potential* members of the unit.

64. See Summers, *The Right to Join a Union,* 47 COL. L. REV. 32, 54 (1947).

of union security.[65] In many states all relationships requiring membership in a union as a condition of employment are outlawed.[66] Others ban only the closed shop.[67] A few states impose particular conditions on unions before they are eligible for a legal closed shop relationship. A greater than majority vote of the employees in the bargaining unit may be necessary,[68] or union admission policies may have to meet prescribed standards.[69] Some states, while not directing their legislation specifically at union security devices, have prohibited undemocratic discrimination policies on the part of unions.[70]

The sanctions accompanying the foregoing limitations include damage suits and injunctions,[71] cease and desist orders by state labor boards,[72] and criminal penalties.[73] These are usually available against both employer and union (or its officers and members).

Virtually all the states which have imposed restrictions on the closed shop and related devices, have also limited the checkoff, requiring written authorizations from individual employees.[74]

In view of the fact that most of these statutes do not exempt industries in interstate commerce, an important problem of inconsistency with federal legislation seems to have been involved. The exemption bestowed by the Wagner Act on the closed shop [75] could perhaps be interpreted as applying only to sanctions imposed by the federal government. The Senate and House Committee Reports on the Act tend to support such a view of Congressional intent.[76] But there are necessary limitations on the ability of anyone to ascertain the factual "intent" of so diverse a group of conflicting interests as a legislative body,[77] and the opposite view could well have been reached by the Supreme Court. The Act specifically

65. This tendency developed during the War. See Dodd, *Some State Legislatures Go to War—On Labor Unions, 29* IOWA L. REV. 148 (1944). But the development has continued up to the present.

66. ARIZ. CONST. AMEND., Nov. 5, 1946; ARK. CONST. AMEND. No. 34, Dec. 7, 1944, Ark. Laws 1947, c. 101; FLA. CONST. AMEND., Nov. 7, 1944; Ga. Laws 1947, Act No. 140; Iowa Laws 1947, S. B. 109; NEB. CONST. AMEND., No. 5, 1946; N. C. Laws 1947, H. B. 229; S. D. CONST. ART. VI, § 2, adopted Nov. 5, 1946, S. D. Laws 1947, S. B. 224; Tenn. Laws 1947, S. B. 367; Tex. Laws 1947, H. B. 23; Va. Laws 1947, c. 2.

67. Maine Laws 1947, c. 395.

68. An affirmative vote of 2/3 of those voting, which equals at least a majority of those eligible to vote, is required by N. H. Laws 1947, c. 194, and Wis. Laws 1945, c. 424. A 3/4 vote is required by Colo. Laws 1943, S. B. 183.

69. The states vary in the degree of discretion allowed to the union. Massachusetts makes unlawful the enforcement of a closed shop contract against anyone not eligible for admission. Mass. Laws 1947, c. 657. Pennsylvania bans racial, religious, or political discrimination and requires that all members of the bargaining unit at the time the contract is made receive a chance to join the union. PA. STAT. ANN. (Purdon, 1941) tit. 43, § 211.6(1)(c). Colorado insists that membership requirements be "reasonable." Colo. Laws 1943, S. B. 183.

70. Conn. Acts of 1947, Pub. Act 171; N. J. Laws 1945, c. 169; N. Y. CIVIL RIGHTS LAW (McKinney, Supp. 1945) § 43.

71. Ariz. Laws 1947, c. 81; Ga. Laws 1947, Act No. 140; N. H. Laws 1947, c. 194.

72. Colo. Laws 1943, S. B. 183; Mass. Gen. Laws, c. 150 (1938), as amended by Mass. Laws 1947, c. 657; PA. STAT. ANN. (Purdon, 1941) tit. 43, § 211.8.

73. Ark. Laws 1947, c. 101; Iowa Laws 1947, S. B. 109; S. D. Laws 1945, c. 80; Tenn. Laws 1947, S. B. 367.

74. See notes 66-69 *supra.*

75. 49 STAT. 452, § 158(3) (1935), 29 U. S. C. § 158(3) (1940).

76. SEN. REP. No. 573, 74th Cong., 1st Sess. 11 (1935); H. R. REP. No. 1147, 74th Cong., 1st Sess. 20 (1935).

77. Unless the intent is so commonly understood that a majority of the legislature regarded themselves as voting for an act with that particular meaning, a searching of committee records for definitive guides to judicial action may give undue power to the minority whose views are reflected in those records.

guaranteed the right of collective bargaining.[78] A restriction on the permissible objectives of this bargaining is clearly a restriction on the right itself. The Court has held that a different sort of restriction on collective bargaining was outside the power of a state when applied to industries in interstate commerce.[79] The problem is rendered moot by the Taft-Hartley Act, but is significant as an indication of the importance of the provision in the latter Act which rendered it moot.[80]

THE TAFT-HARTLEY ACT [81]

The Privileged Area for Membership as a Condition of Employment: The Act permits membership in a labor organization to be made a condition of employment if various requirements are met. Some of these involve the making of the agreement, others the nature of the agreement, and still others the enforcement of the agreement.

As under the Wagner Act, the agreement must be with a majority union which is free from employer domination.[82] The union, however, must now have been *certified* as a majority union.[83] Furthermore, a special election must now be held to determine the views of the employees on the issue of union security.[84] For the agreement to be permitted, it must receive the support of a majority of the employees in the bargaining unit [85]—not simply a majority of those voting, as is required in ordinary representation elections.[86] In view of the fact that the average turnout in union elections has been about 80%,[87] the result of this provision will usually be to require a little less than two-thirds majority of those voting.[88] The calling of an election for this purpose requires a petition signed by 30% of the bargaining unit,[89] and the same non-Communist affidavits [90] and financial reports [91] needed to achieve a representation election are prerequisite. The authorization effected by these elections can be rescinded in the same manner [92] after a lapse of one year.[93]

The agreement permitted by the Act is for a *union shop.* Those who are employees in the bargaining unit at the time the contract is signed must be allowed a thirty day period after the date of signing before union membership is to become a condition of employment.[94] Subsequently hired employees are to be entitled to a similar period after the date of commencement of employment.[95]

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78. 49 STAT. 452, § 7 (1935), 29 U. S. C. 157 (1940).
79. Hill v. Florida, 325 U. S. 538 (1944). There a state limitation on those who might act as bargaining agents was held to be in conflict with the declared right to "bargain through representatives of their own choosing."
80. See p. 113 *infra.*
81. 61 STAT. —, 29 U. S. C. A. § 151 (Cumulative Pamphlet 1947).
82. § 8(a) (3).
83. §§ 8(a) (3), 9(a).
84. §§ 8(a) (3), 9(e).
85. § 8(a) (3).
86. § 9(a).
87. 11 N. L. R. B. ANN. REP. 83 (1946).
88. $\frac{50\%}{80\%} = 62.5\%$.
89. § 9(e) (1).
90. § 9(h).
91. § 9(f).
92. § 9(e) (2).
93. § 9(e) (3).
94. § 8(a) (3).
95. *Ibid.*

While the language of the Act seems to require the thirty day period after creation of every contract,[96] it is possible that the Board will not insist on such a period for employees who have been working under a union shop agreement authorized by the Act. Subsequent contracts could be regarded as merely "renewing" the union shop provision—especially if they are concluded under the authority of the original election. At any rate, the problem may not be too important in view of the fact that very few employees would be tempted to relinquish their membership for thirty days and then pay a new initiation fee.

Under ordinary industrial conditions the chief effect of the limitation on the type of agreement will be to give newly hired employees a trial period in which to ascertain whether they will remain employed long enough to warrant the payment of an initiation fee. Where labor turnover is unusually rapid, however, the language of section 8 (a) (3) permitting an "employer" to make a union shop contract might cause serious difficulties if narrowly construed. In the building industry, for example, a contractor may hire a new set of workers for every new project. If the union is to be limited to making an agreement with each contractor requiring union membership only after thirty days, coverage will be severely restricted. The definition of "employer" in the Act would permit a broader construction of the provision,[97] and probably a contractor's association will be able to make union shop agreements covering all enterprises of its members. The Board would still be required, however, to determine what constitutes "thirty days following the beginning of such employment" [98] for workers who may have two or three employers with layoffs in between during a thirty day period.

The Act, as has been seen, does not make the admission and expulsion policies of the union a test of whether the union may enter into a union shop *agreement.* Indeed, it specifically reserves to unions complete discretion in choosing and keeping members.[99] But a very drastic limitation reduces those who may be discriminated against in employment. The union shop contract may not be enforced against anyone who was denied or deprived of membership for *any reason* other than the failure to tender initiation fees and dues.[100] This provision will undoubtedly be interpreted as a ban on any pressure by the union for discharge of a worker who is willing to pay his dues. Although the language of section 9 (b) (2) forbids only attempts to cause employer discrimination against employees who have been denied or deprived of membership, it would be a plain distortion of the sense of the provision to hold that by retaining an undesirable individual as a member, the union would become privileged to demand his discharge.

Furthermore, the practice of "hiring through the union" may be subject to attack. While nothing in the Act forbids a union to act as an employment agency, such a function would undoubtedly lead to sanctionable discrimination against non-union men. Even when a legitimate union shop agreement is in effect, there might be charges that various workers

96. The employer is permitted to make an agreement "to require as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment or the effective date of *such agreement,* whichever is the later" (emphasis supplied). §8(a)(3).

97. "The term employer includes any person acting as an agent of an employer, directly or indirectly . . ." §2(2).

98. §8(a)(3).

99. §8(b)(1).

100. §8(b)(2).

did not receive equal treatment during the thirty day period when they were entitled not to join the union. These attacks on the union hiring hall and related practices will probably not have much overall effect in industries where the custom is highly developed.[101] Not many workers would bother to bring charges just to get thirty days of employment without paying dues, and employers will probably not see enough benefit in ending these relationships to pay for the industrial strife which is likely to result from a sudden destruction of a long accepted union prerogative.[102]

One provision of the Act which relates to union admission policies goes beyond the mere creation of a condition precedent to the legal discharge of a non-union man. The Board is given the power to determine whether initiation fees are excessive, and if a union has a union shop contract the charging of such fees will in itself be treated as an unfair labor practice.[103] The Board, however, may use its authority to consider "practices and customs of labor organizations in the particular industry" [104] as a means of avoiding requiring unions to reduce their dues. It may be felt that it would generally be unfair to force the members who have paid high fees and thus enriched the treasury to share that treasury with new members who pay less. The provision will still be important, if such an attitude is adopted, as a way of preventing unions from becoming more exclusionary by *raising* their dues.

Sanctions: Aside from the provision just noted, no sanctions are available until an individual is refused a job, discharged, or otherwise discriminated against. When this occurs in a manner not authorized by the Act, he has remedies against both union and employer. It is an unfair labor practice for an employer to encourage union membership "by discrimination in regard to hire or tenure of employment or any condition or term of employment" except in the privileged area outlined above.[105] It is similarly an unfair labor practice for a union "to cause or attempt to cause" him to do so.[106] Both employer and union, then, would be subject to cease and desist orders, and the Board would have the further power, in the case of wrongful discharge, to order reinstatement and the payment of back pay.[107] If the Board finds that the wrongful discharge was the result of activities by the union, the back pay must be furnished by the union.[108]

The use of the cease and desist order against unions raises some interesting problems. The unfair labor practice can be on the part of a union "or its agents." [109] Striking or picketing to procure an unlawful discharge would presumably place workers in the position of "agents" of the union. Would individual strikers be subject to contempt proceedings for violation of a cease and desist order? Section 13 provides that "ex-

101. Hiring through the union is the established practice in many sections of the building, longshore, and shipping industries.

102. Unions may tend to cling to this system in industries where work is intermittent since hiring through the union there is the only effective method of distributing jobs evenly in time of constricted employment opportunities. The evils that may attend such a system (favoritism and graft) are often minimized by partial employer supervision. See SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 83-89 (1941).

103. § 8(b) (5).

104. *Ibid.*

105. § 8(a) (3).

106. § 8(b) (2).

107. § 10(c).

108. *Ibid.*

109. § 8(b).

cept as specifically provided" nothing in the Act should be construed "so as either to interfere with or impede or diminish the right to strike . . ." Making it an unfair labor practice "to cause or attempt to cause" discrimination may not be specific enough to warrant interference with the "right to strike." It should be noted, in this regard, that the section banning certain secondary action by unions actually states that it is an unfair labor practice "to engage in . . . a strike. . . ." [110] Perhaps the enforcement of cease and desist orders in such strikes will be only against union leaders or negotiators.

Picketing raises a similar problem. Section 8 (c) provides that "the expressing of any views, argument or opinion, or the dissemination thereof whether in written, printed, graphic, *or visual form* shall not constitute . . . an unfair labor practice . . ." (emphasis supplied). Furthermore, picketing has been held by the Supreme Court to be within the protection of the First Amendment.[111] It seems then that cease and desist orders will probably not be enforced against picketing.

Even though an employer does not actually know that discrimination against a particular worker would be unprivileged, he still may be subject to a cease and desist order, if he had reasonable grounds for believing that the union refused to accept or keep an employee on any grounds other than the failure to pay fees or dues.[112] "Reasonable grounds for believing" is subject to a great deal of interpretation. The Board, in setting the boundaries of the concept will be faced with conflicting considerations. A broad construction, putting employers at their peril properly to evaluate union motives, may result not only in hardships on employers, but also in undesirable employer-meddling in union affairs.[113] A narrow construction, however, might encourage employers to close their eyes and discharge men rather than become involved in industrial conflict. Furthermore, although back pay may come from the union, an order to reinstate presumably must be directed against the employer, and the Board may therefore seek to convict employers along with unions in order to do everything possible for the injured employee.[114]

State Prerogatives: Perhaps the most important restriction on union security devices imposed by the Taft-Hartley Act will turn out to have been the clarification of the problem of inconsistency between state and federal law on the subject. Section 14 (b) provides that nothing in the Act is to be construed as "authorizing the execution or application of agreements requiring membership in a labor organization as condition of employment" where prohibited by "State . . . law." "State law" probably includes that which is made by judges, but it is the current trend of state legislation [115] which is likely to provide the most repressive effect on union security devices in the future.

Checkoff: Section 302 makes unlawful the payment by an employer to a union representative of dues checked off without a written authorization from the employee, revocable within a year (or at the expiration of the collective bargaining contract if that is to be in less than a year).[116]

110. § 8(b) (4).
111. American Federation of Labor v. Swing, 312 U. S. 321 (1941).
112. § 8(a) (3).
113. See Summers, *The Right to Join a Union*, 47 COL. L. REV. 32, 64 (1947).
114. It should be remembered that, aside from a possible psychological effect on his employees, a cease and desist order imposes no burden on an employer other than the duty to obey it.
115. See the dates of the legislation cited *supra* notes 66-69.
116. § 302(c).

Criminal penalties are imposed on both employer and union representatives for violation of this section.[117] It does not necessarily follow that the compulsory checkoff is outlawed where there is a union shop contract. It is possible that the refusal of an employee to submit the required authorization will be treated as a failure to tender dues and that the discharge of an employee on that ground would therefore be privileged.[118] Presumably the tendering of dues must conform to reasonable union procedures in order to be operative. The Board may, however, feel that such an interpretation would violate the purpose of section 302, and place the checkoff procedure outside the fabric of union custom to which employees will have to conform in order to make a tender of dues which will protect them from discrimination. Under any interpretation section 302 will prevent the checkoff from being applied to non-members, and where there is no union shop the checkoff must be, even as to members, voluntary in substance as well as form.

Evaluation

The inability of unions to achieve a closed shop under the Taft-Hartley Act is not in itself highly significant, since its only usual effect will be to give new employees a thirty day tryout period. This seems generally fair although it may cause difficulties in industries with rapid labor turnovers.

The delimiting of circumstances under which union shops can be secured presents more serious problems. The requirement of a majority of those *entitled* to vote will frequently mean that a majority union will be unable to secure such an agreement. Since this restriction seems to be based on the desirability of protecting non-union workers, it is difficult to see why these workers should not be required to register their objections in the secret election in order to make them effective. Furthermore, the provision makes the requirement of a secret ballot a protection only against *union* recrimination, since employees who fear employer revenge can be forced to boycott the election and thus prevent authorization of a union shop.

Since the most valid complaints concerning union security devices center around admission and expulsion policies, the Act is on firmer ground when it limits union security devices on the basis of these policies. Furthermore, direct penalties against unions are an improvement over attempts under the Wagner Act to accomplish some of the same objectives solely through sanctions against the employer. There are, nevertheless, a number of objections possible to the manner in which Congress approached this problem.

Even though the development of a complete set of permissible grounds for denial or expulsion would have been difficult, a partial formula with some discretion in the Board could have protected employees from unjustifiable discrimination without depriving the unions of much of their power of self protection. The present form of the law may prevent effective union objections to professional strikebreakers and labor spies or may encourage violations of the Act and thus result in heightened industrial unrest. Unions may be unable to avoid the presence of spreaders of racial discord,[119] and they may be seriously hampered in the develop-

117. §§ 302(a), (b), (d).
118. § 8(a)(3).
119. See Harmon v. United Mine Workers, 166 Ark. 255, 266 S. W. 84, 1119 (1924).

ment of the discipline necessary to the fulfillment of their contracts and the prevention of unauthorized work stoppages.[120] The activities of rival unionists or dissenting factions are protected not only when they are appropriate, but when they may lead to a breakdown of the collective bargaining process.[121]

The approach to union admission and expulsion problems solely from the point of view of the legality of enforcement of union shop provisions is too narrow. It should be remembered that the majority union, now as under the Wagner Act, remains the exclusive bargaining agent of all employees in a unit.[122] Yet the Act does nothing to insure that all employees are given an opportunity to secure a voice in the determination of union policies. This limitation may in some cases tend to make available various subtle means of effecting the discrimination forbidden by the Act. The union will tend to side with its members in disputes over seniority, and grievance committees are likely to be complacent about the problems of non-union workers—leaving them to their relatively ineffective right of personal conference with their employers. Under the Railway Labor Act, which forbids the closed shop, the most serious racial discrimination by unions thrives.[123]

The effectiveness of the anti-discrimination provisions is further weakened by the failure to apply them to employers. This disparity may intensify union opposition to the provisions. More important, it makes evasion simpler. If an employer is sufficiently cowed by the superior strength of a union he may bow to their demands for a discriminatory policy and then protect both himself and the union by claiming that the discrimination was the product of his own racial or religious bias.

The surrender of a great deal of the control over union security devices to the states appears to be highly unfortunate. The past records of many states in this type of social engineering have been unstable, with both courts and legislatures showing a regrettable tendency to rely on emotional catch-words rather than industrial facts.[124] The latest crop of state legislation does not display much awareness of the importance of union security to unions and the desirability of effective collective bargaining. Congress evidently did not regard the problem of union security devices as belonging peculiarly to the states. The Taft-Hartley Act imposes only *minimum* limitations. It is difficult to see why supposedly excessive power to develop closed shops or similar relationships should be regarded as a national problem while insufficient opportunity to utilize such devices should be treated as beyond the scope of the national interest.

The problems raised by the union security devices discussed in this note are not amenable to solution by broad general authorizations or

120. See Snay v. Lovely, 276 Mass. 159, 176 N. E. 791 (1931).

121. *See* Matter of Southwestern Portland Cement Company, 65 N. L. R. B. 1, 8 (1945).

122. § 9(a).

123. NORTHRUP, ORGANIZED LABOR AND THE NEGRO, c. 3 (1944). The railroad industry is exempted from the Taft-Hartley Act, § 2(3).

124. Perhaps the most damning evidence of this is the glibness with which "the right to work" is treated. For example, the Florida Constitutional Amendment of Nov. 7, 1944 simply announces that the right to work "shall not be denied or abridged on account of membership or non-membership in any labor union. . . ." Does this mean the right to work at a particular job, or just generally? The right as against employers, fellow-employees, unions, or the government? What about the rights to strike, to decline to associate, to refuse to work, or to disseminate the facts of a "labor dispute" (picket)? It is frightening that a complex industrial relationship should be approached in so naive a manner.

prohibitions. Only by particularized attention to individual industrial relationships can one difficulty be met without the creation of others. The Act by generally limiting the power of unions to use union security devices or inviting the states to do so achieves only the weakening of unionism. The restrictions based on union membership policies will tend to correct a number of abuses, but the indirectness of approach limits their effectiveness, and the broadness of prohibited categories may also needlessly weaken some unions.

F. P.